Supreme Court, U.S.
FILED

(1) 061345 APR 6 - 2007

No. 06- OFFICE OF THE CLERK

# In the Supreme Court of the United States

MIPRO HOMES, L.L.C., AND BUILDERS LEAGUE OF SOUTH JERSEY, INC.,

*Petitioners*,

v.

MOUNT LAUREL TOWNSHIP,

*Respondent.*

**Petition for a Writ of Certiorari to the Supreme Court of New Jersey**

## PETITION FOR A WRIT OF CERTIORARI

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## QUESTION PRESENTED

Whether the Takings Clause of the Fifth Amendment to the Constitution prohibits a municipality from taking private property for "public use" when the municipality's public use determination is ad hoc, pretextual, and not part of a comprehensive planning process.

## RULES 14.1 AND 29.6 STATEMENT

Petitioners (defendants-appellants below) are MiPro Homes, L.L.C., and the Builders League of South Jersey, Inc. Additional defendants in the Superior Court, Law Division, who are not petitioners here, were Lorraine C. Elbon and 190 Elbo, L.L.C.

Respondent (plaintiff-appellee below) is Mount Laurel Township, New Jersey.

Petitioner Builders League of South Jersey, Inc., is a New Jersey non-profit corporation. It has no publicly traded stock and no publicly held corporation owns 10% or more of its stock.

Petitioner MiPro Homes, L.L.C. is a New Jersey limited liability company. It has no publicly traded stock and no publicly held corporation owns 10% or more of its stock.

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## PETITION FOR A WRIT OF CERTIORARI

MiPro Homes, L.L.C., and the Builders League of South Jersey, Inc., respectfully petition for a writ of certiorari to review the judgment of the Supreme Court of New Jersey.

## OPINIONS BELOW

The opinion of the Supreme Court of New Jersey (App., *infra*, 1a-7a) is reported at 188 N.J. 531, 910 A.2d 617. The opinion of the Superior Court of New Jersey, Appellate Division (App., *infra*, 8a-26a), is reported at 379 N.J. Super. 358, 878 A.2d 38. The opinion of the Superior Court of New Jersey, Law Division (App., *infra*, 27a-46a), is unreported.

## JURISDICTION

The judgment of the Supreme Court of New Jersey was entered on December 7, 2006. On February 15, 2007, Justice Souter extended the time for filing this petition for certiorari to April 6, 2007. This Court's jurisdiction is invoked under 28 U.S.C. § 1257(a).

## CONSTITUTIONAL PROVISION INVOLVED

The Fifth Amendment to the United States Constitution provides, in relevant part: "nor shall private property be taken for public use, without just compensation."

## STATEMENT

This Court recently held that government has broad powers to take private property for "public use" under the Fifth Amendment. *Kelo* v. *City of New London*, 545 U.S. 469 (2005); see also *Berman* v. *Parker*, 348 U.S. 26 (1954); *Hawaii Housing Auth.* v. *Midkiff*, 467 U.S. 229 (1984). But although the Court "afford[s] legislatures broad latitude in determining what public needs justify the use of the takings power," and will not second-guess whether "the expected public benefits will actually accrue" from a taking, it also has recognized that not every exercise of eminent domain passes judicial muster under the Takings Clause. *Kelo*, 545 U.S. at

483, 487. Rather, the Constitution mandates minimum procedural requirements to ensure that a taking is in fact for the purported public use. Two safeguards emphasized by this Court but ignored by the Supreme Court of New Jersey are particularly relevant in this case: a municipality's public use determination must not be ad hoc but must be made as part of a comprehensive planning process, and it must not be pretextual. *Id.* at 483-484; see also *id.* at 492-493 (Kennedy, J., concurring); *id.* at 504 (O'Connor, J., dissenting). These limitations—which the supreme courts of other States also have recognized as necessary for the protection of private property—are essential if the public use requirement of the Takings Clause is to amount to anything more than "hortatory fluff." *Id.* at 497 (O'Connor, J., dissenting).

This "egregious" case, as Justice Rivera-Soto explained in his dissent from the Supreme Court of New Jersey's decision upholding the condemnation at issue, presents "'a random taking'" and hence "an improper exercise of the power of eminent domain." App., *infra*, 2a-3a. Mount Laurel Township took 16 acres of private land—on which petitioner Mi-Pro Homes had already started to construct a fully permitted and zoning-compliant 23-home residential development—following an ad hoc determination that the property should instead be used for "open space." That determination took place outside the scope of the Township's comprehensive planning process and was found by the trial court to be a pretext for the distinct goal of stopping residential development. No similar determination had been prompted by the prior owner's proposed use of the property for an assisted living facility, which would have put less demand on public services (schools in particular).

This case therefore implicates both of the specific limitations on public use decisions identified in *Kelo*. It perfectly illustrates the importance of such limitations to the protection of private property, which for the Framers of the Bill of Rights supplied "the clear, compelling, even defining, in-

stance of the limits that private rights place on legitimate government." JENNIFER NEDELSKY, PRIVATE PROPERTY AND THE LIMITS OF AMERICAN CONSTITUTIONALISM 9 (1990). The Court should take this opportunity to elaborate upon the standards articulated in *Kelo*, with which the Supreme Court of New Jersey's ruling conflicts and as to which state courts and lower federal courts are in considerable disarray, and it should reverse an erroneous decision that threatens the most basic underpinnings of our Constitution. See THE FEDERALIST NO. 54 (James Madison), at 339 (C. Rossiter ed., 1961) ("Government is instituted no less for protection of the property than of the persons of individuals").

### A. Mount Laurel's Condemnation Of MiPro's Property Was Ad Hoc, Pretextual, And Not Pursuant To A Comprehensive Plan For The Preservation Of Open Space.

MiPro Homes contracted in 2001 for the purchase of 16 acres of land in Mount Laurel Township from 190 Elbo, L.L.C., intending to subdivide the parcel and to build 23 single family homes. App., *infra*, 28a. The parcel was already zoned for residential use and MiPro's planned development required no variances. In 1997 Mount Laurel had considered the possibility of "slow[ing] down the rate of the municipality's growth" by "rezoning substantial areas for less intensive uses," but had decided against that approach. *Id.* at 9a.

Before execution of final sale, MiPro applied for Preliminary Major Subdivision Approval, which Mount Laurel's Planning Board approved. The sale was finalized on August 30, 2001. MiPro then applied for Final Major Subdivision Approval, which the Planning Board granted on May 9, 2002. With final municipal approval for the project in hand, MiPro conducted "a significant amount of site preparation work," such as clearing, grading, and excavation for roads,

utility lines, and stormwater detention, and stockpiling dirt. App., *infra*, 14a, 28a; PA365-371, PA415-419.[1]

During this same period of time, without notice to MiPro, several Mount Laurel officials began to investigate acquiring MiPro's property as "open space." In October 2001, five months after its Planning Board had approved MiPro's development proposal, Mount Laurel added the MiPro site to the list of prospective open space acquisitions in its Open Space Recreation Plan. App., *infra*, 13a. In April 2002, a year after preliminary subdivision approval was granted, Mount Laurel adopted Ordinance 2002-4, which characterized MiPro's property as being "under severe development pressure" and authorized its acquisition "by agreement or through the exercise * * * of the power of eminent domain." PA453-454. After MiPro was granted final subdivision approval by the Planning Board, and after Mount Laurel's attempts at voluntary acquisition failed, the Township filed suit seeking to condemn MiPro's property. PA1-5.

"The evidence * * * is undisputed" that Mount Laurel's goal in acquiring MiPro's property for "open space" was to "[s]ave" the land "[f]rom [d]evelopment" and "reduc[e] the number of residential units in the Township." App., *infra*, 31a-32a. Mount Laurel's conceded purpose was to prevent the "significant cost[s]" that it believed would flow from MiPro's planned development of single family homes in the form of demand for "education and other municipal services," which the Township believed would be offset by "little by way of tax ratables." App., *infra*, 14a, 32a-33a; see also PA491-492.

Mount Laurel did not act pursuant to articulated standards or its established land use plan in pursuing this goal. In deciding to acquire MiPro's property, Mount Laurel officials

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[1] "PA" refers to the Plaintiff's Appendix filed by Mount Laurel in the Superior Court of New Jersey, Appellate Division.

did not consult with the Planning Board, either prior to passing Ordinance 2002-4 or before filing the present condemnation action, to determine whether acquisition of the MiPro property would be consistent with the Township's open space goals and policies. App., *infra*, 43a-44a; PA478-479. Mount Laurel's 2000 Master Plan does not indicate a need for open space at the MiPro site and does not recommend a change in the zoning category for MiPro's property. PA129-131. Furthermore, prior to Mount Laurel's approval of MiPro's development plans, MiPro's property was not listed as a potential acquisition in capital improvement program documents, on the official township map, or on the open space suitability map. PA1915; PA868; PA871.

In fact, only in January 2003, seven months after this litigation was commenced, did Mount Laurel amend its 2000 Master Plan to provide that the Township's policy is to acquire "the maximum amount of open space remaining in the township that can be achieved with sound use of financial resources." And that belated revision, far from reflecting careful planning, simply lumped together "*all* potential parcels" in the Township that had not yet been developed as "locationally suitable for permanent open space." App., *infra*, 14a (emphasis added); PA798-799.

Mount Laurel officials, in the course of attempting to acquire MiPro's property, never detailed the Township's need for more open space. In fact, Louis Glass, Township Planner for 27 years, admitted that Mount Laurel's open space was already "well in excess" of that needed according to existing standards: it had "seven hundred and twenty-one acres [of open space] available," which amounted to "a two hundred and ninety-six acre surplus using [the] methodology" set forth in the 2000 Master Plan. PA729, 737; see App., *infra*, 33a-34a. By contrast, George Morris, the Mount Laurel Township Deputy Manager, explained in his deposition that the Township had not set a maximum goal, or a minimum goal, for the acquisition of open space and had

conducted "no study * * * to determine how much passive open space was needed in Mount Laurel or what the active open space needs were." App., *infra*, 32a. Instead, Morris expected that "the voters" would "tell [the Township when] enough is enough." *Ibid.*; PA542. Confirming Mount Laurel's utter lack of methodological consistency in its approach to taking private property for open space, John Maczuga, public planning manager of the firm employed by the Township to assist in open space acquisition, testified that Mount Laurel prepared no prioritization or ranking of properties suitable for acquisition. App., *infra*, 33a; PA628-629; see also PA776-783, 795-796 (Harry McVey, a professional planner for the Planning Board, testified that Mount Laurel did not systematically analyze the need for or suitability of parcels for passive open space, MiPro's property being no exception).

In short, as the trial court concluded with regard to the official principally responsible for Mount Laurel's "open space issues," George Morris, "[t]here was no open space plan from which he worked, no coordination with the planning board or consultation of the Master Plan, * * * no prioritization or ranking of properties desirable for and needed for recreation and open space," and "no study or report from which he sought or could receive guidance as to the amount of active and passive open space needed." App., *infra*, 32a, 43a; see also PA546-547.

**B. The Trial Court Dismissed The Complaint In Condemnation Because It Was Inadequately Planned And Pretextual.**

On the basis of these undisputed facts, the Superior Court, Law Division, granted MiPro's and the intervenor Builders League of South Jersey's motions for summary judgment. The trial court recognized that municipalities have "broad discretion" to determine whether the acquisition of private property is in the public interest and that courts gen-

erally will not probe a municipality's "motive or the necessity for the taking." App., *infra*, 35a. Nevertheless, citing the Township's utter lack of planning and numerous admissions of pretext, the court held that "overwhelming evidence" established that Mount Laurel's condemnation of MiPro's property was improperly "motivated by an ulterior, disguised purpose." *Id.* at 35a-36a, 46a. The Township's "real purpose" was to prevent "yet another" politically unpopular "residential development" that would contribute to the "rising cost of education and other municipal services." *Id.* at 42a, 44a. According to the court, the preservation of open space was merely "a collateral consequence"—"not even a secondary goal"—of the condemnation, a fact confirmed by public comments and signs posted throughout the Township declaring that, as requested by the voters, "more land ha[d] been spared from development." *Id.* at 31a, 44a. The Township's lack of "planning and zoning" and the pretextual reason it gave for the condemnation of MiPro's land amounted, the court concluded, to an "abus[e of] the awesome power of eminent domain." *Id.* at 45a.

**C. The Appellate Division Reversed.**

The Appellate Division did not disturb any of the trial court's factual findings, and conceded that Mount Laurel's "master plan did not [at the relevant time] identify open space as a planned use in the area where [MiPro's land] is located." App., *infra*, 18a. It ruled, however, that the Township had statutory authority to condemn private land for open space and did not have to "have a plan" in order to exercise that authority or act in accordance with "open space [designations] in Mount Laurel's master plan." *Id.* at 16a.

Furthermore, it did not matter that the Township's stated "open space" motive for the condemnation was a pretext for stopping residential development. App., *infra*, 23a-24a. "Commercial property owners send no children to [the Township's] schools and set out no trash for municipal col-

lection"; by contrast, residential development creates a "significant cost to all taxpayers for many years, perhaps indefinitely." *Id.* at 12a-13a. Mount Laurel's "concern that additional residential development would * * * impose added stress on its school system and other municipal services" was therefore "reasonable." *Id.* at 24a. Mount Laurel's actions were particularly justified, the court concluded, because MiPro's planned use for the land was not for assisted living or affordable housing, but for single-family homes priced between $400,000 and $450,000 that the court asserted "would not serve a comparable public interest." *Id.* at 13a, 25a.

### D. The Divided Supreme Court Of New Jersey Affirmed, Holding That The Public Interest In Condemning Private Property For Open Space Overcomes The Need For Comprehensive Planning.

The Supreme Court of New Jersey affirmed the judgment of the Appellate Division.[2] The majority held that Mount Laurel has a "strong and sustained public interest in the acquisition and preservation of open space," demonstrated by statutes authorizing expenditures for this purpose, as well as Mount Laurel residents' support "for the issuance of state and county bonds to provide funding for open space acquisition." App., *infra*, 1a. The acquisition of MiPro's property was consistent with this objective, the state supreme court reasoned, because it was directed at "limit[ing] the overcrowded schools, traffic congestion and pollution that accompanies development." *Id.* at 1a-2a.

Justice Rivera-Soto dissented, agreeing with the trial court that "this case presents an improper exercise of the

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[2] Underlining the importance of the issues presented, separate amicus briefs were filed in the Supreme Court of New Jersey by the National Association of Home Builders, New Jersey Builders Association, State of New Jersey, New Jersey State League of Municipalities and New Jersey Institute of Local Government Attorneys, and Chosen Freeholders of the County of Burlington.

power of eminent domain." App., *infra*, 2a. Justice Rivera-Soto would have held that the Township's asserted open space "public policy basis for the condemnation of MiPro's property" was merely an "after-the-fact" justification for a "'random taking,'" which in truth was carried out "'to stop residential development.'" *Id.* at 3a-4a.

Justice Rivera-Soto also "reject[ed] the Appellate Division's value judgment in respect of the social worth of MiPro's development plans" as compared to assisted living or affordable housing, concluding that a judge's view "of what is or is not socially redeeming" has no place in the analysis of the propriety of eminent domain. App., *infra*, at 4a-5a. Because Mount Laurel acted unreasonably, arbitrarily, capriciously, and in bad faith in condemning MiPro's land, Justice Rivera-Soto would have reinstated summary judgment for petitioners. *Id.* at 5a.

## REASONS FOR GRANTING THE PETITION

"Eminent domain condemnation represents one of the legal system's most drastic non-penal incursions into the rights of individuals." Zygmunt J.B. Plater & William L. Norine, *Through the Looking Glass of Eminent Domain: Exploring the "Arbitrary and Capricious" Test and Substantive Rationality Review of Governmental Decisions*, 16 B.C. ENVTL. AFF. L. REV. 661, 663-664 (1989). In this case, Mount Laurel took MiPro's 16-acre parcel—which MiPro already had begun to develop for a fully permitted, zoning-compliant subdivision of single family homes—for use as "open space" that fit nowhere within the Township's comprehensive plan. Mount Laurel did so, moreover, through an open space determination that concededly was a pretext for stopping residential development because it would impose more demands on schools and other government services. The Supreme Court of New Jersey was able to uphold this ad hoc and pretextual taking only because it assumed that the

"public use" condition does not operate as a meaningful limit on the takings power.

The Supreme Court of New Jersey's ruling is flatly inconsistent with this Court's precedents and at odds with the recognition by other federal courts and state supreme courts that the public use requirement imposes constraints upon a municipality's power of eminent domain. This Court should grant certiorari to clarify that its decision in *Kelo* v. *City of New London*, 545 U.S. 469 (2005), did not strip the public use requirement of all content but left intact—at the least—procedural limitations on eminent domain that require reversal in this case. The practical importance of this issue is undeniably immense. See, *e.g.*, DANA BERLINER, OPENING THE FLOODGATES: EMINENT DOMAIN ABUSE IN THE POST-*KELO* WORLD (June 2006), available at http://www.castlecoalition.org/publications/floodgates/index.html (describing the substantially increased use of condemnation after *Kelo*); DAVID A. DANA & THOMAS W. MERRILL, PROPERTY: TAKINGS 207 (2002) ("eminent domain is being pressed into service in increasingly questionable ways").

## I. THE SUPREME COURT OF NEW JERSEY'S DECISION CONFLICTS WITH THIS COURT'S PRECEDENTS.

The "lingering suspicion" left by the Supreme Court of New Jersey's decision "is that condemnees would have been better off in mc lern courts if the Framers had failed totally to mention their situation" in the Bill of Rights, "as with 'privacy' rights." Plater & Norine, *supra*, 16 B.C. ENVTL. AFF. L. REV. at 679. This Court's ruling in *Kelo*, limiting substantive review of eminent domain decisions, engendered nationwide debate and extensive criticism. See, *e.g.*, H.R. Res. 340, 109th Cong. (2005). The New Jersey court's decision, by stripping away procedural protections as well, threatens the severe "demoralization" that a leading commentator has predicted must result from arbitrary obliteration of landown-

ers' expectations of security in their private property. Frank I. Michelman, *Property, Utility, & Fairness: Comments on the Ethical Foundations of "Just Compensation" Law*, 80 HARV. L. REV. 1165, 1214 (1967).

Petitioners believe, however, that a careful reading of the opinions in *Kelo* and of the earlier decisions upon which this Court in *Kelo* relied confirms that there is "no reason why the Takings Clause of the Fifth Amendment, as much a part of the Bill of Rights as the First Amendment or Fourth Amendment, should be relegated to the status of a poor relation." *Dolan* v. *City of Tigard*, 512 U.S. 374, 392 (1994). Properly understood, the line of cases culminating in *Kelo* recognize procedural limitations, of constitutional dimension, on government's power to declare that a condemnation is for "public use." This Court has never deviated from its holding in *Cincinnati* v. *Vester*, 281 U.S. 439, 446-447 (1930), that despite the Court's "great respect [for] legislative declarations" a condemnation cannot stand if it is supported only by "a bare recital," rather than appropriate analysis, or if the stated goal is "foreign to the actual purpose of the appropriation as ultimately disclosed." See *Kelo*, 545 U.S. at 487 n.17 (citing *Vester* with approval); see also *Joslin Mfg. Co.* v. *City of Providence*, 262 U.S. 668, 676 (1923) (municipality's determination that land was "required for public use" may not be "palpably arbitrary"). Any more hands-off approach to a municipality's public use decision would "treat the constitutional provision as giving such a sweeping authority to municipalities as to make nugatory the express condition upon which the authority is granted." *Vester*, 281 U.S. at 447. The Supreme Court of New Jersey's decision runs directly counter to these principles.

1. Though this Court affords state and local governments "broad latitude in determining what public needs justify the use of the takings power," deference to government's "public use" determinations is not absolute. *Kelo*, 545 U.S. at 483. In upholding New London's exercise of eminent domain

in *Kelo*, this Court stressed the importance to its analysis of the fact that the taking occurred as part of a "carefully formulated" "integrated development plan," which had resulted from a process of extensive planning activities, neighborhood meetings, and studies by state agencies of "the project's economic, environmental, and social ramifications," including evaluation of "six alternative development proposals." *Id.* at 473-474 & n.2, 483; see also *id.* at 483-484 (emphasizing "the comprehensive character" of New London's "carefully formulated * * * economic development plan" and "the thorough deliberation that preceded its adoption"). This Court recognized that a different result may obtain when eminent domain is exercised "outside the confines of an integrated development plan." *Id.* at 487.

By contrast to the "heightened form of review" of eminent domain that this Court rejected in *Kelo*—judicial inquiry into whether "the expected public benefits will actually accrue"—a court's insistence on procedural safeguards for the "public use" determination does not involve it in "'empirical debates over the wisdom'" of a municipality's goals in exercising the takings power. *Kelo*, 545 U.S. at 488. Requiring that a municipality's public use decision result from planning and not be pretextual does not entail "second-guess[ing of] the City's *considered* judgments about *the efficacy of its development plan.*" *Ibid.* (emphasis added). To the contrary, these safeguards serve to ensure that public use decisions that lead to the taking of private property are indeed "considered" and the result of planning, rather than merely ad hoc reactions to not-in-my-back-yard political pressures.

Justice Kennedy's separate opinion in *Kelo* confirms that it is an "incorrect assumption" that the Takings Clause "imposes no meaningful judicial limits on the government's power to condemn any property it likes." *Kelo*, 545 U.S. at 492 (Kennedy, J., concurring). While Justice Kennedy had no occasion in *Kelo* for "conjecture as to what sort of cases might justify a more demanding standard," he assumed as a

bedrock principle that the Fifth Amendment prohibits takings, whatever their "'stated public purpose,'" that have only "incidental or pretextual public justifications." *Id.* at 491, 493; see Gideon Kanner, *What Does It Take to Recognize Bad Faith?*, JUST COMPENSATION, Dec. 2006, at 11 ("the bottom line" of the Supreme Court of New Jersey's decision in this case "is that as long as the use for which the property is taken is deemed public, it does not matter whether the city's stated intentions in taking it are truthful or pretextual. So much for Justice Kennedy's concurring opinion in *Kelo*"). Justice Kennedy emphasized in *Kelo* that New London's proposed taking suffered from no such defect because it "occurred in the context of a comprehensive development plan," the City "complied with elaborate procedural requirements that facilitate review of the record and inquiry into the city's purposes," and "the procedures employed" were not "prone to abuse." *Kelo*, 545 U.S. at 493.

The dissenters in *Kelo* acknowledged Justice Kennedy's view that a municipality may fail the public use test as a result of "the process by which [it] arrived at the decision to take" and that, accordingly, the Clause "prohibit[s takings] generated with less care" through a "less elaborate process." 545 U.S. at 502, 504 (O'Connor J., dissenting). Justice O'Connor was also careful to note the *Kelo* majority's emphasis on the fact that New London's "plan is the product of a relatively *careful deliberative process*" and that the City "proposes to use eminent domain for a multipart, *integrated plan* rather than for *isolated property transfer*." *Id.* at 503-504 (emphasis added).

In short, the members of the majority and dissent alike in *Kelo* recognized that some "external, judicial check" on public use determinations, "however limited, is necessary if this constraint on government power is to retain any meaning." *Id.* at 497 (O'Connor, J., dissenting). The majority opinion, the principal dissent, and Justice Kennedy in his separate opinion all found that check in procedural safe-

guards surrounding New London's public use determination. Absent these safeguards, municipalities could substantially eliminate the public use limitation on their eminent domain power, evading effective judicial review of their public use determinations by proceeding in an ad hoc manner and for pretextual reasons.

2. This Court's decisions in *Berman* and *Midkiff*, upon which *Kelo* heavily rests, likewise acknowledged the importance under the Fifth Amendment of a procedurally sound public use determination. In *Berman*, Justice Douglas's opinion for a unanimous Court emphasized that the challenged condemnation of a non-blighted department store occurred pursuant to "a comprehensive or general plan," under which a redevelopment agency planned "the area [at issue] as a whole" rather than approaching condemnation on a "piecemeal," "structure-by-structure basis." 348 U.S. at 29, 34. That the district proceeded under a "balanced, integrated plan" was central to the Court's decision that "owner after owner [should not be] permitted to resist these redevelopment programs on the ground that his particular property was not being used against the public interest." *Id.* at 34-35. See Carol J. Miller & Stanley A. Leasure, *Post-Kelo Determination of Public Use and Eminent Domain in Economic Development Under Arkansas Law*, 59 ARK. L. REV. 43, 67 (2006) ("In both *Kelo* and *Berman*, the Court rejected the piecemeal approach"; "to be successful," land use plans must be "comprehensive [and] coordinated").

Likewise, Justice O'Connor's opinion for the Court in *Midkiff* emphasized the care with which the Hawaii legislature had considered and developed its scheme to compel the sale of fee simple estates to lessees, including the elaborate process, with formal findings, provided by the Hawaii Housing Authority in connection with each taking. *Midkiff*, 467 U.S. at 232-234. That scheme was a "comprehensive and rational approach to identifying and correcting market failure." *Id.* at 242.

3. The existence of procedural limitations on a municipality's public use determination is congruent with this Court's oft-repeated admonition that the "concepts of 'fairness and justice' * * * underlie the Takings Clause." *Tahoe-Sierra Preservation Council, Inc.* v. *Tahoe Regional Planning Agency*, 535 U.S. 302, 336 (2002); see also, *e.g.*, *Andrus* v. *Allard*, 444 U.S. 51, 65-66 (1979) (the Takings Clause subjects governmental regulation "to the dictates of 'justice and fairness'"); *Armstrong* v. *United States*, 364 U.S. 40, 49 (1960). And they are the minimum protections required to ensure that the Takings Clause stands, as the Framers intended, "as a shield against the arbitrary use of governmental power." *Webb's Fabulous Pharm.* v. *Beckwith*, 449 U.S. 155, 164 (1980). That the Takings Clause applies to the States and their subdivisions through the Due Process Clause of the Fourteenth Amendment, see *Chicago, B. & Q. R.R.* v. *City of Chicago*, 166 U.S. 226, 238-239 (1897), only serves to underline that the eminent domain power is subject to core procedural limitations.

As one commentator recently recognized, consistent with *Kelo*, "[a]n alternative test" for public use "would demand 'reasonable process,'" including evidence "of adequate planning procedures." Eric Rutkow, *Kelo v. City of New London*, 30 HARV. ENVTL. L. REV. 261, 275 (2006). That inquiry would "plac[e] a procedural check on governments in order to protect property owners," thereby "ensuring heightened procedural review when inoffensive property is being condemned"—a goal "promoted by the Fourteenth Amendment's Due Process Clause and Lockean principles concerning liberty of property." *Id.* at 276. The commentator concluded that such a procedural inquiry is important in order to determine "whether A's property is being taken for any coherent reason. When the condemned property presents no social harm by itself"—like MiPro's condemned parcel—"at the very least the state should have to show it has given thought to the use of property that goes beyond indefinite or

contradictory labels such as 'park support'" (or "open space"). *Ibid.* See also Clayton Gillette, *Kelo and the Local Political Process*, 34 HOFSTRA L. REV. 13, 20 (2005) (endorsing "procedural requirements" that "reduce the probability of abuse").

Leading scholars agree that, absent substantive limits on what qualifies as a "public use," giving meaning to the Takings Clause requires "that courts strictly enforce procedural limitations on the exercise of eminent domain" in order to "filter out * * * some of the questionable uses" of that power. DANA & MERRILL, PROPERTY: TAKINGS, *supra*, at 205-206; see also *id.* at 208 (recent abuses "suggest the need for increased judicial vigilance in enforcing procedural rules associated with eminent domain"). Insisting on these procedural requirements, which derive from "the Due Process Clauses, as well as the Takings Clause," "has the virtue of" protecting private property rights by "enlisting the courts in the performance of a traditional judicial function for which they are well qualified." *Id.* at 205, 207. Accord Thomas W. Merrill, *The Economics of Public Use*, 72 CORNELL L. REV. 61, 77-81 (1986).

## II. THE SUPREME COURT OF NEW JERSEY'S DECISION CONFLICTS WITH RULINGS OF OTHER STATE AND FEDERAL COURTS.

The "public use" limitations on eminent domain set forth in this Court's decisions and recognized by academic commentators are also reflected in numerous state and federal decisions with which the Supreme Court of New Jersey's ruling conflicts.

In the Ninth Circuit, for example, courts reject the use of eminent domain when its exercise is not the result of planning or is pretextual. Thus, in *Armendariz* v. *Penman*, 75 F.3d 1311, 1321 (9th Cir. 1996), the en banc court refused to defer to a city's ostensible public use determination made "behind closed doors" and with a view to justifying its ac-

tions in litigation. And in *99 Cents Only Stores* v. *Lancaster Redev. Agency*, 237 F. Supp. 2d 1123, 1129 (C.D. Cal. 2001), appeal dismissed as moot, 2003 WL 932421 (9th Cir. Mar. 7, 2003), the court explained that "[n]o judicial deference is required * * * where the ostensible public use is demonstrably pretextual" (citing *Armendariz*).

In *Cottonwood Christian Center* v. *Cypress Redev. Agency*, 218 F. Supp. 2d 1203, 1229-1230 (C.D. Cal. 2002), the court held that a taking failed the public use requirement because the extent of a redevelopment agency's "planning efforts" consisted of "finding a potential landowner for property that they did not own, and then designing a development plan around that new user." *Cottonwood* also made clear that "[c]ourts must look beyond the government's purported public use to determine whether that is the genuine reason or if it is merely a pretext." *Id.* at 1229. As here, the government in *Cottonwood* offered up a pretextual reason to justify an ad hoc taking made outside the context of a comprehensive plan.[3]

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[3] Other federal courts of appeals have similarly emphasized the importance of a government acting in accordance with its comprehensive plan when other important constitutional rights are at stake. For example, in *Southside Fair Housing Comm.* v. *City of New York*, 928 F.2d 1336 (2d Cir. 1991), the Second Circuit upheld the City's sale of land to the Hasidic community against a First Amendment establishment of religion claim. It held that, under *Berman*, 348 U.S. at 34-35, when a city has in place a comprehensive "urban renewal plan" that is "'balanced'" and "'integrated,'" as did New York City, and acts pursuant to that plan, it may "make provision for sales of all sorts to private users" without running afoul of the Establishment Clause. 928 F.2d at 1347. The Seventh Circuit reached a similar conclusion in *Vision Church* v. *Village of Long Grove*, 468 F.3d 975, 992 (7th Cir. 2006) (holding that, because the municipality acted pursuant to a comprehensive plan for land use, the challenged municipal land

Several state supreme courts have likewise rejected ad hoc and pretextual takings. In *Southwestern Ill. Dev. Auth.* v. *National City Envtl., L.L.C.*, 768 N.E.2d 1, 10 (Ill. 2002), for example, the Illinois Supreme Court, in striking down the use of eminent domain to supply parking to a racetrack, observed that the Development Authority "did not conduct or commission a thorough study of the parking situation" or "formulate any economic plan requiring additional parking at the racetrack." The taking was not "rooted * * * in the economic and planning process" and violated the public use requirements of the federal and state Takings Clauses, in part, for that reason. *Ibid.*

Similarly, in *Pheasant Ridge Assocs.* v. *Town of Burlington*, 506 N.E.2d 1152, 1156-1157 (Mass. 1987), the Supreme Judicial Court of Massachusetts disapproved a taking for a park and the construction of moderate income housing when the Town's real objective was to prevent construction of low income housing. Of particular relevance here, the court held that "[t]o have taken the site * * * to prevent the impact of the proposed development on the water, sewer, traffic, and other problems" would have been "an indirect and unfairly selective attack" on those problems and therefore improper. Among the factors that the court pointed to as undermining the validity of the taking—also relevant here—were that the site had not, before the planned development, "been considered for acquisition for park or recreational uses," that "[t]he matter of taking the subject site came forward only when the [developer's] proposal became known," and that the taking had not been subject to the usual planning and consultation process. *Id.* at 1157. The ruling in *Pheasant Ridge* cannot be reconciled with the ruling of the Supreme Court of New Jersey in this case.

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use regulations had a non-secular purpose and did not violate the Establishment Clause).

The Supreme Court of Georgia also would have decided this case differently. In *Earth Mgt., Inc.* v. *Heard County*, 283 S.E.2d 455, 459-461 (Ga. 1981), it held that "no law, statutory, constitutional or otherwise," permits a county to condemn property as "a public park for recreational purposes"—"even though the land may be put to this use after condemnation"—when "the real reason for its being taken was to thwart the application of another use" (a waste management facility in that case, single-family homes that would attract families with children in the present case). See also *Carroll County* v. *City of Bremen*, 347 S.E.2d 598, 599 (Ga. 1986) (invalidating the county's taking of land purportedly for use as a police training area where the "true reason for the condemnation was to prevent construction of a public sewage-treatment facility").

Supreme Courts in other states have reached the same result on similar analyses. In *City of Rapid City* v. *Finn*, 668 N.W.2d 324, 326-329 (S.D. 2003), the Supreme Court of South Dakota concluded that the City acted in bad faith and violated the public use requirement when it condemned plaintiffs' property for the asserted purpose of "facilitat[ing] public travel." The court deemed significant the fact that, prior to entering annexation negotiations with a third party who requested an access easement over the plaintiffs' property as a condition of annexation, "the City had demonstrated no interest in the property"; in fact, it previously had taken the position that the land was unsuitable for a roadway "because of [its] geographical nature." *Id.* at 327. In addition, in condemning the property, the City failed to act in conformity with its usual practice of conducting a "drainage study" and a "preliminary engineering evaluation to determine the feasibility" of the development. *Id.* at 328-329. The logical conclusion, according to the Supreme Court of South Dakota, was that the City acted unlawfully in condemning the property. *Id.* at 329.

The Supreme Court of Connecticut reached a similar conclusion in *AvalonBay Communities, Inc.* v. *Town of Orange*, 775 A.2d 284, 299-303 (Conn. 2001). AvalonBay contracted to purchase 9.6 acres of land to build a luxury apartment complex, within which some units would be set aside as affordable housing rentals. AvalonBay filed its site plan and applied for a special use permit with the Town Plan and Zoning Commission, which was denied. Thereafter, the Town Economic Development Commission began drafting plans for the development of an industrial park on the site and the Town voted to condemn the parcel. AvalonBay sued, alleging that the industrial park was a pretext to thwart the construction of affordable housing units. The state supreme court agreed. The Town's plans were not "developed and adopted in accordance with the relevant statutory provisions" and contained only the "'bare minimum amount of information and planning as to any future industrial park.'" *Id.* at 583. "[T]he haste and sparsity of the plan," the court concluded, demonstrated that the industrial park was adopted in "bad faith" and "as a pretext to thwart what would otherwise be a legitimate use of the property." *Id.* at 577, 583. See also *In re Hewlett Bay Park*, 265 N.Y.S.2d 1006, 1010 (Sup. Ct. 1966) ("The precipitate way in which the village moved to condemn this property, without any specific plan for its development, on the eve of the hearing of an application by the owner to use it for parking purposes" was "a perversion of the condemnation process"; finding the public use requirement violated when the village's real purpose was "not to use this property for something affirmative, so much as * * * to prevent its use for something else which the village authorities regard as undesirable"). In none of these courts would the condemnation of MiPro's property, undertaken without comprehensive planning and for pretextual reasons, have passed legal muster.

## III. ANALYZED UNDER THE CORRECT STANDARDS, MOUNT LAUREL'S "PUBLIC USE" DETERMINATION VIOLATED THE TAKINGS CLAUSE.

Under the Takings Clause standards set forth in *Kelo*, *Berman*, and in state supreme court decisions like *Pheasant Ridge*, *Earth Management*, and *AvalonBay*, Mount Laurel's taking of MiPro's property violated the Fifth and Fourteenth Amendments. The Supreme Court of New Jersey erred in stripping all meaning from the public use limit on eminent domain by ignoring even the most basic procedural predicates for a valid condemnation decision.

The constitutional requirement that a municipality's public use determination be procedurally sound—that the taking result from planning rather than random, ad hoc decision-making and that the reasons given for the taking be the real ones, not a pretext for some other motive—were violated here. Justice Rivera-Soto's summary of facts "past dispute" (App., *infra*, 5a-6a) demonstrates why:

> MiPro's property was zoned for residential use, precisely the use MiPro intended, and, hence, no variances were required; the only governmental approval MiPro sought—and validly secured—was a subdivision approval to subdivide one large lot into smaller, residential lots that nonetheless each still conformed to the requirements of the Township's zoning ordinance; the Township failed to amend its zoning ordinance to list MiPro's property as other than for residential use in anything remotely close to a timely and fair manner; and, the Township's obvious purpose was not to increase open space for the use and enjoyment of its citizens, but plainly to forestall additional development and its concomitant additional demand on municipal facilities or services.

As the trial court elaborated, as a matter of "undisputed" fact Mount Laurel did not develop an "open space plan" that prioritized or ranked properties suitable for open space acquisition; its master plan did not "projec[t] 'need' for additional open space"; it performed no "study" and issued no "report" on the open space requirements of the Township; it allowed development of other residential properties to proceed, despite similarities in their size and nature to MiPro's project; the Township Manager did not consult the Planning Board in deciding to exercise eminent domain power; Mount Laurel was not concerned with the site's development when it was going to be used for an assisted living facility that would replace open space; and when it did belatedly amend its master plan to identify more potential open space it did so in a crude and over-inclusive manner. App., *infra*, 31a-35a, 43a-46a; see Andrew R. Davis, *Mt. Laurel's New Legacy? MiPro Could Widen the Gulf Between Homeowners and Renters*, 181 N.J.L.J. 1222 (Sept. 26, 2005) (Mount Laurel's "planning board amended the master plan after it granted final subdivision approval and during the pendency of the litigation. This amendment was rather crude in that it simply targeted all remaining undeveloped land in Mt. Laurel as open space" and was "so overbroad that it could not possibly qualify as a 'plan' under the most liberal interpretation of the word").

At a minimum, comprehensive planning for open space would have required Mount Laurel to conduct a study to determine the community's open space needs, then determine if open space was needed in the vicinity of MiPro's land, and then determine if MiPro's land, specifically, was suitable for open space uses. Mount Laurel conducted the necessary inquiry at not one of those planning stages. Instead its actions, in the words of one commentator, rested on "an oxymoronic land-use concept: 'spot planning,'" and "[j]ust about all of [them] appear to reflect intentions that are less than pure." Davis, *supra*, 181 N.J.L.J. at 1222.

In these circumstances, Mount Laurel's "[a]mbush acquisition" of MiPro's land "is the antithesis of planning—a detailed plan and methods for land use and development." Gary S. Forshner & Vincent J. Mangini, *Court Greenlights Ambush Acquisitions: Recent Eminent Domain Decision Endorses Assault on Housing*, 181 N.J.L.J. 1219 (Sept. 26, 2005). As Justice Rivera-Soto explained, "the Township's transparent after-the-fact explanations of its public policy basis for the condemnation of MiPro's property simply do not withstand serious scrutiny" under the Constitution. App., *infra*, 4a. To the contrary, Mount Laurel's ad hoc and pretextual decision to condemn demonstrates that it "acted unreasonably, in bad faith, or in circumstances revealing arbitrary or capricious actions." *Id.* at 5a; see also Kanner, *supra*, JUST COMPENSATION, Dec. 2006, at 12 ("bad faith * * * surely includes cases where the city says one thing about the public purpose while taking the subject property for another one").

If the public use requirement of the Takings Clause is to retain any meaning after *Kelo*, "towns should [not] be able to ignore their own land use plans and ordinances in order to discriminate against families with children." Editorial, *Ambush Acquisition*, 181 N.J.L.J. 490 (Aug. 8, 2005). Mount Laurel has run afoul of that restriction before, having been found in *Southern Burlington County NAACP* v. *Township of Mount Laurel*, 336 A.2d 713, 729 (N.J. 1975), to have systematically used its zoning "to restrict the number of families in the municipality having school age children and thereby keep down local education costs." Striking down that zoning, the Supreme Court of New Jersey observed that "[s]uch restrictions are so clearly contrary to the general welfare as not to require further discussion." *Ibid.*; see also App., *infra*, 8a-9a; *Southern Burlington County NAACP* v. *Township of Mount Laurel*, 456 A.2d 390 (N.J. 1983).

"Municipal planning, done properly and comprehensively, is the appropriate vehicle to address traffic, congestion and crowded schools." Editorial, *Ambush Acquisition*,

*supra*, 181 N.J.L.J. at 490. "Once a municipality completes its land-use planning," including "open space planning," "it should be bound by the regulations resulting from that process, just as landowners are," without "popular sentiment and political reaction" being "allowed to trump the deliberative planning process." *Ibid.* These admonitions reflect this Court's precedents, including *Kelo*, which in turn rest on a fundamental respect for property rights inscribed in the Constitution and given effect by procedural protections disregarded by the court below.

* * * * *

In sum, *Kelo* and its predecessors clearly show that defects of precisely the sort present here—an ad hoc open space determination that was not subject to comprehensive planning and that served to camouflage an animus against residential development—are fatal to a municipality's public use decision. Other federal and state courts agree that the Takings Clause requires that a municipality's public use decisions satisfy basic standards of procedural fairness. The Supreme Court of New Jersey's radical departure from these principles requires this Court's intervention. It supplies an ideal opportunity for the Court to elaborate the standards outlined in *Kelo* and to dispel the widespread uncertainty in the lower courts over the constitutional limits on taking property for "public use."

## CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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APRIL 2007

## APPENDIX A

## SUPREME COURT OF NEW JERSEY

**MOUNT LAUREL TOWNSHIP, Plaintiff-Respondent,**

**v.**

**MiPRO HOMES, L.L.C., Defendant-Appellant, and Lorraine C. Elbon and 190 Elbo, L.L.C., Defendants, and Builders League of South Jersey, Inc., a New Jersey non-profit corporation, Defendant-Intervenor-Appellant.**

Argued May 1, 2006.
Decided Dec. 7, 2006.

PER CURIAM.

We affirm the holding of the Appellate Division for the reasons expressed by Judge Skillman in his thoughtful and well-written opinion. We recognize, as did the panel below, that the citizens of New Jersey have expressed a strong and sustained public interest in the acquisition and preservation of open space. The Appellate Division points to the numerous statutes enacted in the 1960s and 70s, and even more recently in the 1990s, authorizing loans and grants to expand the State's Green Acres Program. Most pertinent here, various of those statutes provide municipalities with the power of eminent domain to acquire land for recreation and conservation purposes. *Mt. Laurel Twp.* v. *MiPro Homes, L.L.C.*, 379 N.J. Super. 358, 371-372, 878 A.2d 38 (App. Div. 2005) (citing New Jersey's Green Acres statutes, N.J.S.A. 13:8A-1 to -55, authorizing state and local governments to acquire land for recreation and conservation purposes). Even more telling, New Jersey residents have voted repeatedly for the issuance of state and county bonds to provide funding for open space acquisition.

That Mount Laurel Township sought to limit development, thereby to limit the overcrowded schools, traffic congestion and pollution that accompanies

development, does not alter our disposition of this case. The town's motive is not inconsistent with the motive driving the public interest in open space acquisition generally. *See* N.J. Dep't of Envtl. Prot., *Smart Growth*, at http://www.state.nj.us/dep/antisprawl/ (last modified Nov. 14, 2005) (stating that New Jersey is "the nation's most densely populated state, and the most developed" and that "[i]ll-conceived land use and poorly designed development threatens our vital drinking-water supplies, devours our open space, spoils our landscape and creates traffic congestion that pollutes our air.").

Finally, we note that on remand and the appointment of condemnation commissioners, the property will be valued at its fair market value, including value associated with MiPro's final subdivision approval obtained twenty-two days before the filing of the declaration of taking. *Cf. State ex rel. Commissioner of Trans.* v. *Caoili*, 135 N.J. 252, 268, 639 A.2d 275 (1994) (stating that "potential subdivision is a highly material factor bearing on the optimum use of the property and its fair market value.").

**Justice RIVERA-SOTO, dissenting.**

I disagree with the majority's holding in two fundamental respects. First, I conclude, much as the trial court did, that this case presents an improper exercise of the power of eminent domain. Second, although the majority attempts to lighten the effect of its ruling by adding to the quantum of damages to which MiPro Homes, L.L.C. (MiPro) is entitled as a result of the condemnation proceedings instituted by Mount Laurel Township (Township), the majority simply does not go far enough. Therefore, I respectfully dissent.

I.

A.

Unlike the Appellate Division's broad conclusion that "a municipality's acquisition for open space of properties on

which residential development is planned constitutes a proper use of the eminent domain power[,]" *Mt. Laurel Twp.* v. *MiPro Homes, L.L.C.*, 379 N.J. Super. 358, 362, 878 A.2d 38 (App. Div. 2005)[1] a conclusion embraced by the majority, *ante*, 188 N.J. at 533, 910 A.2d at 618, I subscribe to the analysis adopted by the trial court, which aptly concluded that "the condemnation here can best be described as a random taking without legal justification."

This case presents the unique and, in my view, egregious circumstance in which "the real purpose [of the condemnation] was to prevent yet another residential development pressure." In those particular circumstances, I must side with the trial court when it explained that "[i]f the Township desires to continue to purchase property for open space, it may do so. Those purchases may only be made from willing sellers, not by resort to condemnation of tracts under development from private owners unwilling to give up their properties and vested approvals."

We have long held that "[t]he exercise of [the power to condemn] will not be interfered with by the courts in the absence of fraud, bad faith or circumstances revealing arbitrary or capricious action." *Texas E. Transmission Corp.* v. *Wildlife Preserves, Inc.*, 48 N.J. 261, 269, 225 A.2d 130 (1966). As early as 1891, our predecessor court held that private property could not be taken via condemnation save upon "[a] fair sense ... said to be promotive of the welfare or convenience of the community...." *North Baptist Church* v. *City of Orange*, 54 N.J.L. 111, 113, 22 A. 1004 (Sup. Ct. 1891) (citation and internal quotation marks omitted). Sixty years later, we clarified that "the decision of [a] condemnor is final *as long as it acts reasonably and in good faith*." *City of Newark* v. *N.J. Tpk. Auth.*, 7 N.J. 377, 385, 81 A.2d 705,

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[1] The Appellate Division refers to MiPro as "Mipro." However, MiPro's written submissions all capitalize the "p" in MiPro, and both the majority and I have adopted that convention.

*appeal dismissed*, 342 U.S. 874 (1951) (quoting 1 *Nichols, Eminent Domain* 383 (3rd ed. 1950)) (emphasis supplied). We ultimately described the standard to be applied thusly: "The exercise of [the power to condemn] will not be upset by the courts in the absence of an affirmative showing of fraud, bad faith or manifest abuse." *City of Trenton* v. *Lenzner*, 16 N.J. 465, 473, 109 A.2d 409 (1954), *cert. denied*, 348 U.S. 972 (1955).

When gauged through that prism, the Township's transparent after-the-fact explanations of its public policy basis for the condemnation of MiPro's property simply do not withstand serious scrutiny. That examination requires that I conclude, as the trial court inescapably did, that "the public purpose articulated for the taking of MiPro's property for passive open space was not based on a true public need but solely in response to the community's sentiment expressed at the polls, coupled with clear indications from township officials, that the property be acquired to stop residential development." Thus, to the extent the majority accepts the Appellate Division's reasoning and rejects the trial court's thoughtful analysis and conclusions, I respectfully dissent.

B.

Furthermore, I reject the Appellate Division's value judgment in respect of the social worth of MiPro's development plans. According to the panel, the exercise of the Township's power of eminent domain would have been barred if MiPro's development had been for "medical rehabilitation and nursing facilities," or "multi-family housing affordable to middle-income families[,]" or even for MiPro's "predecessor in title['s] planned . . . assisted living facility on the site[.]" *Mt. Laurel Twp.* v. *MiPro Homes, L.L.C.*, *supra*, 379 N.J. Super. at 376-77, 878 A.2d 38. Having thus couched the issue presented, the Appellate Division condemned MiPro's development plan because its "development of single-family homes that will be affordable

only to upper-income families would not serve a comparable public interest." *Id.* at 377, 878 A.2d 38. In my view, a judge's individualized and idiosyncratic view of what is or is not socially redeeming has no place in determining whether the sovereign's exercise of the power of eminent domain is proper. The issue here was and remains whether the Township—and *not* MiPro—acted unreasonably, in bad faith, or in circumstances revealing arbitrary or capricious actions. Applying that yardstick, the trial court held—in my view, correctly—that the Township failed to meet its burden. I would not disturb that determination, least of all in the pursuit of some ill-defined social goal.

II.

Even if the Township's condemnation efforts could be justified as a proper taking, I also disagree with the measure of damages the majority allows. According to the majority, "on remand and the appointment of condemnation commissioners, the property will be valued at its fair market value, including value associated with MiPro's final subdivision approval obtained twenty-two days before the filing of the declaration of taking." *Ante*, 188 N.J. at 534, 910 A.2d at 618 (2006). That measure of damages is, to me, woefully inadequate.

The relevant facts are past dispute: MiPro's property was zoned for residential use, precisely the use MiPro intended, and, hence, no variances were required; the only governmental approval MiPro sought—and validly secured—was a subdivision approval to subdivide one large lot into smaller, residential lots that nonetheless each still conformed to the requirements of the Township's zoning ordinance; the Township failed to amend its zoning ordinance to list MiPro's property as other than for residential use in anything even remotely close to a timely and fair manner; and, the Township's obvious purpose was not to increase open space for the use and enjoyment of its citizens, but plainly to forestall additional development and

its concomitant additional demand on municipal facilities or services.

In that context, limiting the condemnee's recovery to the fair market value of his property, including any increase in the value resulting from the subdivision approval, denies the property owner the basis of his bargain. MiPro purchased this property with the intent of developing a single-family housing development. MiPro acted on that intent, secured the required permits and commenced construction. Once MiPro secured its permits and acted in reliance thereon, MiPro's rights became vested. *See generally* N.J.S.A. 40:55D-49 (granting three-year non-disturbance period to major subdivision or site plan preliminary approval); N.J.S.A. 40:55D-52 (granting two-year non-disturbance period to zoning final approvals). It is obvious that MiPro engaged in this course of conduct for a reason: to profit from the development and sale of single-family residences.

Central to our system of justice is the concept that "[a]n injured person is entitled to be made whole." *Patusco* v. *Prince Macaroni, Inc.*, 50 N.J. 365, 368, 235 A.2d 465 (1967). In that same vein, "[t]he goal of compensatory damages is to restore the plaintiff to the same position it was in prior to the occurrence of the wrong." *Material Damage Adjustment Corp.* v. *Open MRI of Fairview*, 352 N.J. Super. 216, 232, 799 A.2d 731 (Law Div. 2002). Those core principles lead to but one fair and equitable conclusion: that, unless the Township can demonstrate that MiPro was unable or unwilling to complete that development, the proper quantum of damages arising from this taking is the aggregate of MiPro's restitution damages[2] and expectancy damages.[3]

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[2] Those include MiPro's development costs to date, including acquisition costs. *See Material Damage Adjustment Corp.* v. *Open MRI of Fairview, supra*, 352 N.J. Super. at 232, 799 A.2d 731 (defining restitution as "an award of compensatory damages [that] requires the full restoration or 'restitution' to plaintiff of all payments made"); *Black's Law Dictionary* 1315 (7th ed. 1999)

Anything less takes from MiPro a property right without just compensation, something prohibited by our Constitution, N.J. Const. art. I, ¶ 20 ("Private property shall not be taken for public use without just compensation."), and a concept embodied in the Eminent Domain Act of 1971. N.J.S.A. 20:3-29 ("The condemnee shall be entitled to compensation for the property, and damages, if any, to any remaining property, together with such additional compensation as provided for herein, or as may be fixed according to law.").

Therefore, because the quantum of damages allowed by the majority on remand artificially deflates the value of MiPro's property, I respectfully dissent.

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(defining restitution as "[c]ompensation or reparation for the loss caused to another").

[3] Those include the profit MiPro could reasonably have been expected to reap as a result of this development project. *See Furst* v. *Einstein Moomjy, Inc.*, 182 N.J. 1, 14, 860 A.2d 435 (2004) (defining "expectation interest" as "the benefit of the bargain"); *Sons of Thunder, Inc.* v. *Borden, Inc.*, 285 N.J. Super. 27, 104, 666 A.2d 540 (App. Div. 1995), *rev'd on other grounds*, 148 N.J. 396, 690 A.2d 575 (1997); *Noye* v. *Hoffman-La Roche, Inc.*, 238 N.J. Super, 430, 437, 570 A.2d 12 (App. Div.), *certif. denied*, 122 N.J. 146, 147, 584 A.2d 281 (1990).

## APPENDIX B

## SUPERIOR COURT OF NEW JERSEY, APPELLATE DIVISION

**MOUNT LAUREL TOWNSHIP, Plaintiff-Appellant/Cross-Respondent,**

**v.**

**MiPRO HOMES, L.L.C., Defendant-Respondent/Cross-Appellant, and Lorraine C. Elbon and 190 Elbo, L.L.C., Defendants, and Builders League of South Jersey, Inc., Defendant-Intervenor-Respondent.**

Argued April 26, 2005.
Decided Aug. 2, 2005.

Before Judges SKILLMAN, GRALL and GILROY.

The opinion of the court was delivered by SKILLMAN, P.J.A.D.

The issue presented by this appeal is whether evidence that a municipality's motive in selecting properties for open space acquisition is to slow down residential development makes use of the eminent domain power for this purpose improper. We conclude that a municipality's acquisition for open space of properties on which residential development is planned constitutes a proper use of the eminent domain power.

Plaintiff Mount Laurel Township is a rapidly developing municipality. Between 1960 and 1999, Mount Laurel's population grew from 5,249 to approximately 40,000, and it continues to grow at a rate of approximately 1,000 people per year. This rapid growth has created a strain on Mount Laurel's schools, roadways, police and fire departments and other municipal services.

For a substantial period of time, Mount Laurel was a party to exclusionary zoning litigation. In fact, Mount Laurel

was the defendant in the leading early exclusionary zoning cases in this State, *Southern Burlington County NAACP* v. *Township of Mount Laurel*, 67 N.J. 151, 336 A.2d 713, *cert. denied*, 423 U.S. 808. (1975) and *Southern Burlington County NAACP* v. *Township of Mount Laurel*, 92 N.J. 158, 456 A.2d 390 (1983). A 1985 order in that litigation resulted in a large section of Mount Laurel being placed in an "overlay" zone, in which a developer was permitted to construct five residential units per acre, provided 15% of the units were set aside for low- and moderate-incoming housing. This zoning, as well as Mount Laurel's limited financial resources, prevented the municipality from preserving a significant amount of land for open space from the mid 1980s to the late 1990s.

In 1997, Mount Laurel repealed the zoning ordinance establishing the overlay zone, as allowed under an "order of repose" entered in the exclusionary zoning litigation. At the same time, Mount Laurel's governing body decided to take action to slow down the rate of the municipality's growth and to preserve additional land for open space. Initially, the governing body planned to pursue this objective by rezoning substantial areas for less intensive uses and then seeking to acquire selected parcels for open space. However, after the municipality's counsel advised that this approach could pose legal problems, the governing body decided instead to pursue creation of additional open space by a public referendum authorizing the raising of additional municipal revenue for this purpose and applying for money available for acquisition of land for open space under the Green Acres program.

In July 1998, Mount Laurel's governing body adopted Ordinance 1998-6, which placed a referendum on the November 1998 ballot for a proposed tax increase of two cents per one hundred dollars of assessed value for acquisition of open space. The interpretative statement accompanying the referendum indicated that an owner of property assessed at $125,000 would pay an additional $25 in

property taxes per year for the next twenty years, for a total of $500, for this open space acquisition program. The statement also indicated that the fund created by this additional tax assessment would be "used exclusively for the acquisition of land for open space preservation, farmland preservation, historic preservation, parks and recreation." In campaigning for passage of this referendum, the Mayor of Mount Laurel and other public officials pointed out that the proposed open space acquisition program would not only preserve additional open space for passive and active recreational uses but also relieve residents of the tax burdens that would result from residential development. The referendum passed by an overwhelming vote.

The same November 1998 ballot containing this municipal referendum question also contained Burlington County and State ballot questions seeking authorization for the expenditure of additional public funds for acquisition of open space. The County question sought voter authorization for a County tax increase of two cents per one hundred dollars of assessed value (in addition to the municipal tax increase of the same amount) for open space acquisition. See Land Trust Alliance, *Voters Invest in Parks and Open Space: 1998 Referenda Results* at 5 (1999). The State question sought voter approval of a constitutional amendment dedicating $98 million annually for thirty years from the existing State sales and use tax to "finance open space, farmland, and historic preservation." *Manual of the Legislature of New Jersey* at 922 (Skinder-Strauss Assocs. 1999).

In urging approval of both the municipal and State ballot questions, the Mayor of Mount Laurel stated in a letter to voters:

> One of the advantages of the State referendum is that it creates a special preference category for municipalities that have passed an open space referendum to get resources quicker. In other words, if you vote "yes"

> on . . . the municipal referendum for open space, and the State question also passes statewide, Mount Laurel will be in a special category whereby the Township will be able to obtain State funding for open spaces more quickly and on a higher priority basis.

Both the State and County ballot questions authorizing additional expenditures of public funds for open space acquisition were approved. Land Trust Alliance, *supra*, at 5.

After approval of these referenda, the Mount Laurel governing body undertook to identify all remaining open space in the municipality to determine which parcels would be appropriate for acquisition and could qualify for Green Acres funding. The governing body retained a consultant, Bay Pointe Engineering, to assist in this process.

With the consultant's assistance, Mount Laurel adopted an Open Space Recreation Plan as required by the regulations governing the Green Acres program, N.J.A.C. 7:36-6.4. Mount Laurel's plan envisions both active and passive recreational uses in the open space it plans to acquire. These uses include a proposed bicycle/pedestrian path that will provide links between the municipality's parks, schools and other major public and private facilities. The plan's goal is to create a "community of place" within Mount Laurel:

> [T]he township is trying to address the need to provide a community of place, or a defined identity that characterizes the township. With the absence of a village core, the township consists of pockets of housing developments and commercial and industrial developments along the major highways.
>
> The township is now attempting to provide open spaces to soften the density of development, to provide relief from the stresses of suburban living, and to provide a unified land use pattern that links together all parts of the township. This community of place will be achieved by providing open spaces, and then linking them together

with a pedestrian or multi-purpose path system. The path systems can be located along County and township streets, through woods and fields and along stream corridors to provide continuous linkage. Some open space parcels may be used for recreation, while other parcels may be used for passive open space and support of environmentally sensitive areas. The pedestrian linkage between homes and nearby open spaces will be the major design element in creating a community of place.

In determining what land to acquire for open space, Mount Laurel assigns priority to the acquisition of large parcels zoned for residential development. The Mayor of Mount Laurel explained the reasons for this priority in her letter urging Mount Laurel residents to vote for the referendum authorizing the raising of additional revenue for acquisition of land for open space:

> The first reason is that residentially zoned land is, generally speaking, less expensive than commercially zoned land. I say this even though all land in Mount Laurel is expensive. Secondly, all of us who are property owners in Mount Laurel benefit from an industrial/commercial base which pays very substantial taxes but which requires few services. Commercial property owners send no children to our schools and set out no trash for municipal collection. They remove their own snow, clean their own parking lots and have a relatively low incidence of calling the Township for municipal service such as emergency rescue, police, etc.
>
> On the other hand, if the Township acquires land upon which homes would otherwise be built, those homes, just like your home and mine, would put additional burdens on all of the Township's taxpayers. The costs for municipal services are always increasing—just like our own personal budgets. Educational costs for however many children each home would send to the

school system over the entire time that those homes are standing is obviously a significant cost to all taxpayers for many years, perhaps indefinitely.

Defendant Mipro Homes, L.L.C. is the owner of a 16.3-acre parcel located in an area of Mount Laurel zoned for residential use, which is occupied by a single house. Mount Laurel initially did not include this parcel in the list of properties sought to be acquired for open space because Mipro's predecessor in title planned to construct an assisted living facility on the site that would have included units affordable to low- and moderate-income residents. However, Mipro contracted to purchase the site in the summer of 2001 for the purpose of building twenty-three single-family residences, priced between $400,000 and $450,000, and obtained preliminary subdivision approval for this development in June 2001. Title to the property was conveyed to Mipro on August 30, 2001.

When Mount Laurel's governing body became aware that the proposed use of the Mipro site had changed from an assisted living facility to a development for single-family residences, it decided to add the site to the list of parcels to be acquired under its open space acquisition program. On October 10, 2001, the Mount Laurel Township Manager sent a letter to Mipro which stated that its property had been "preliminarily listed as a potential parcel to be included in the Township Recreation and Open Space Plan." On October 15, 2001, the governing body adopted a resolution that added the Mipro site to its open space acquisition plan. On November 6, 2001, the residents of Mount Laurel approved another referendum authorizing an additional tax increase of two cents per one hundred dollars of assessed value for acquisition of open space, which assured adequate funding to acquire the Mipro site. On April 15, 2002, the governing body adopted an ordinance authorizing acquisition of the Mipro site.

On May 9, 2002, the Planning Board granted Mipro's application for final subdivision approval, which was memorialized by a resolution adopted on June 13, 2002.

After Mount Laurel was unable to obtain the Mipro site by voluntary acquisition, it brought this condemnation action on May 24, 2002, and filed a declaration of taking on May 31, 2002. During the twenty-two-day period between the grant of final subdivision approval and the filing of the declaration of taking, Mipro performed a significant amount of site preparation work on the site.

Mipro's answer to Mount Laurel's complaint asserted that the purpose of the condemnation action was to stop residential development and that this is an unlawful purpose. The trial court granted the Builder's League of South Jersey's motion to intervene in support of Mipro's position.

During the pendency of this action, the Planning Board adopted an amended master plan, which stated that the goals of the recreation and open space plan included acquisition of "the maximum amount of open space remaining in the township that can be achieved with sound use of financial resources" and reduction of traffic congestion and costs of municipal services. The amended master plan also stated that "[s]ince Mount Laurel is urbanized throughout the entire township, all potential parcels are locationally suitable for permanent open space." In addition, the Commissioner of the Department of Environmental Protection (DEP) notified Mount Laurel by a letter dated August 1, 2002, that its application for a $400,000 matching grant for acquisition of the Mipro site had been approved.

The case was brought before the court by cross-motions for summary judgment supported by voluminous factual materials. In a written opinion, the trial court recognized that Mount Laurel had initiated proceedings to condemn Mipro's property "for a facially valid purpose, namely, the acquisition of Mipro's tract to be held in perpetuity as a passive open

space." Nevertheless, the court concluded that Mount Laurel's "real purpose" in condemning Mipro's property "was to prevent yet another residential development in a township already under severe development pressure." The court stated that "the public purpose articulated for the taking of Mipro's property for passive open space was not based on a true public need but solely in response to the community's sentiment expressed at the polls, coupled with clear indications from township officials that the property be acquired to stop residential development." The court concluded that although Mount Laurel may use public money to prevent residential development and preserve open space by voluntary purchase from the owners, it may not resort to the power of eminent domain for these purposes:

There is nothing legally wrong with the chosen approach as long as the township *purchases* the property from a willing seller. The abuse of discretion and arbitrary, capricious and unreasonable action by the Township occurred when it abused the awesome power of eminent domain for a purpose not contemplated by, and indeed proscribed by, our Eminent Domain Law . . . If the Township desires to continue to purchase property for open space, it may do so. Those purchases may only be made from willing sellers, not by resort to condemnation of tracts under development from private owners unwilling to give up their properties and vested approvals.

Accordingly, the trial court entered summary judgment dismissing Mount Laurel's action to condemn Mipro's property.

Mount Laurel filed a notice of appeal from the summary judgment. Thereafter, the trial court entered another order awarding Mipro $219,815.14 for counsel fees, costs and other expenses it incurred as a result of the condemnation action. Mount Laurel filed a separate notice of appeal from this order. In the second appeal, Mipro filed a notice of cross-appeal claiming that the trial court should have awarded

additional damages resulting from the condemnation action. We now consolidate the appeals.

We conclude that a municipality has statutory authority to condemn property for open space; that a municipality may exercise this authority even though it does not presently have a plan to devote the property to active recreational uses; that the selection of properties for open space acquisition on which residential development is planned does not constitute an improper exercise of the eminent domain power; and that Mipro did not present evidence that could support a finding that Mount Laurel's decision to condemn its property constituted an abuse of the eminent domain power. Therefore, we reverse the judgment dismissing Mount Laurel's complaint as well as the order awarding Mipro counsel fees, costs and expenses and remand the case for an order appointing condemnation commissioners.

Before discussing the primary issue presented by this appeal, we first address the Builders League's argument that Mount Laurel lacked legal authority to condemn Mipro's site for open space because the zone in which the property is located was not designated as open space in Mount Laurel's master plan.

Under the Municipal Land Use Law (MLUL), N.J.S.A. 40:55D-1 to -163, a master plan must include a "land use plan element" that, among other things, shows "the existing and proposed location, extent and intensity of development of land to be used in the future for varying types of residential, commercial, industrial, agricultural, recreational, educational and other public and private purposes or combination of purposes." N.J.S.A. 40:55D-28(b)(2)(b). A master plan also may contain various optional elements, including "[a] conservation plan element providing for the preservation, conservation, and utilization of natural resources, including, to the extent appropriate, . . . open space." N.J.S.A. 40:55D-28(b)(8).

The MLUL requires a zoning ordinance to be "substantially consistent with the land use plan element and the housing plan element of the master plan" unless the governing body adopts a zoning ordinance inconsistent with those elements "by affirmative vote of a majority of the full authorized membership of the governing body, with the reasons of the governing body for so acting set forth in a resolution and recorded in its minutes." N.J.S.A. 40:55D-62(a). However, a zoning ordinance is not required to be substantially consistent with the conservation element of the master plan.

In any event, this case involves a municipality's exercise of the eminent domain power rather than zoning. Moreover, the statutes authorizing acquisition of land for open space establish separate administrative procedures designed to assure that a municipality's open space program reflects sound planning. One of those statutes establishes the Office of Green Acres, N.J.S.A. 13:8C-24(a)(1), which is required to adopt application procedures for grants and loans and develop criteria and policies for evaluating and ranking projects, N.J.S.A. 13:8C-24(b)(3)(a). The Green Acres Program has adopted detailed regulations that prescribe the information a municipality must supply in order to obtain such funding. N.J.A.C. 7:36-1.1 to -21.4.

This information includes a recreation and open space inventory and a detailed description of the project for which the municipality seeks funding. N.J.A.C. 7:36-6.4. Before filing this action, Mount Laurel applied to the Green Acres Program for funding under these provisions and secured a $400,000 grant for acquisition of the Mipro site, which reflects a finding by the Green Acres Program that the Mipro site is suitable for open space acquisition. Therefore, we conclude that Mount Laurel's governing body had authority to condemn the Mipro site for open space even though the

master plan did not then identify open space as a planned use in the area where it is located.[4]

The Builders League also argues that Mount Laurel lacked authority to condemn the Mipro site because the governing body did not refer this proposed acquisition to the Planning Board in accordance with N.J.S.A. 40:55D-31. This section is part of Article IV of the MLUL, which authorizes a governing body to delegate authority to the planning board "to prepare a program of municipal capital improvement projects." N.J.S.A. 40:55D-29. However, the requirement that a governing body "refer the action involving such specific project to the planning board for review and recommendation in conjunction with [the] master plan" only applies if the governing body has authorized the planning board "to prepare a program of municipal capital improvement projects" in accordance with N.J.S.A. 40:55-29. Because there is no indication that Mount Laurel's governing body delegated such authority to the Planning Board, the governing body has authority to condemn the Mipro site without referring the proposed acquisition to the Planning Board for its review and recommendation under N.J.S.A. 40:55D-31.

II

We now turn to the primary issue presented by this appeal: whether an action to condemn property for open space may be maintained even if the condemnee can show that the municipality's motive in selecting particular

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[4] Because we reach this conclusion, we have no need to decide whether amendment of the master plan during the pendency of this action, which recognized that all land in Mount Laurel is "locationally suitable for open space," would permit maintenance of this action under the "time of decision" rule even if there were a requirement that land be designated in the master plan for use as open space before it can be acquired for this purpose. *See Manalapan Realty, L.P.* v. *Township of Manalapan*, 140 N.J. 366, 386, 658 A.2d 1230 (1995).

properties for acquisition is to slow down residential development.

The New Jersey Constitution recognizes that private property may be condemned for "public use." N.J. Const. art. I, ¶ 20. The Eminent Domain Act, N.J.S.A. 20:3-1 to -50, establishes the procedures that govern eminent domain actions authorized by other statutory enactments, N.J.S.A. 20:3-6.

Our Legislature has long recognized that preservation of open space constitutes a public use, and therefore municipalities may utilize the eminent domain power to acquire property for this purpose. As early as 1917, the Legislature enacted the "Home Rule Act," L. 1917, c. 152, art. XXXVI, § 1, now codified in N.J.S.A. 40:61-1, which provides that a municipality may acquire property for "open spaces" by exercise of the power of "condemnation."

In the 1960s and 70s, the Legislature expressly recognized the public interest in acquisition of land for open space by enactment of the New Jersey Green Acres Land Acquisition Act of 1961, L. 1961, c. 45; N.J.S.A. 13:8A-1 to -18, the New Jersey Green Acres Land Acquisition Act of 1971, L. 1971, c. 419; N.J.S.A. 13:8A-19 to -34, and the New Jersey Green Acres Land Acquisition and Recreation Opportunities Act, L. 1975, c. 155; N.J.S.A. 13:8A-35 to -55. These statutes declare that it is in the public interest for the State and local governments to acquire additional land for "public recreation and the conservation of natural resources," N.J.S.A. 13:8A-2; N.J.S.A. 13:8A-20; N.J.S.A. 13:8A-36, and authorize the State to make loans or grants to municipalities to acquire property for these purposes, N.J.S.A. 13:8A-4; N.J.S.A. 13:8A-22; N.J.S.A. 13:8A-38. These statutes also provide that the power of eminent domain may be used to acquire land for recreation and conservation purposes. N.J.S.A. 13:8A-6; N.J.S.A. 13:8A-8; N.J.S.A. 13:8A-24; N.J.S.A. 13:8A-26; N.J.S.A. 13:8A-40; N.J.S.A. 13:8A-42.

In recent years, the Legislature has reaffirmed a municipality's statutory authority to utilize the power of eminent domain to acquire land for open space and established new methods to generate the financial resources required for such acquisitions. In 1997, the Legislature enacted what is sometimes referred to as the Municipal Trust Fund Act, N.J.S.A. 40:12-15.1 to -15.9, which confers authority upon a municipality to submit a public referendum to the voters for approval of a tax levy for "acquisition of lands for recreation and conservation purposes." N.J.S.A. 40:12-15.7(a)(1)(a). This legislation states that "[r]ecreation and conservation purposes" includes "the use of lands for . . . open space," and it specifically authorizes acquisition of land for this purpose by "condemnation," N.J.S.A. 40:12-15.1. Mount Laurel's residents have approved three referenda under this legislation authorizing tax levies for the acquisition of property for recreation and conservation purposes. Land Trust Alliance, *supra,* at 5-7.

In November 1998, the voters approved N.J. Const. art. VIII, § 2, ¶ 7, which dedicates funds from the State sales and use tax for acquisition and development of land for recreation and conservation purposes as well as farmland and historic preservation. Less than a year after adoption of this constitutional amendment, the Legislature enacted the Garden State Preservation Trust Act, N.J.S.A. 13:8C-1 to -42. This legislation contains legislative declarations that "there is growing public recognition that the quality of life, economic prosperity, and environmental quality in New Jersey are served by the protection and timely preservation of open space" and that "it is in the public interest to preserve as much open space . . . as possible within the means provided by the 1998 constitutional amendment." N.J.S.A. 13:8C-2. The Garden State Preservation Trust Act creates a trust fund to assist "[l]ocal government unit[s]," which include municipalities, N.J.S.A. 13:8C-3, to acquire land for recreation and conservation purposes. N.J.S.A. 13:8C-27(a)(2)(a). In addition, this legislation expressly recognizes

that the methods by which a municipality may acquire land thereunder include "eminent domain." N.J.S.A. 13:8C-3.

In short, there are multiple statutory enactments that confer authority upon municipalities to acquire land by eminent domain for preservation of open space and land conservation.

III

The next question is whether a municipality may exercise this authority even though it does not presently have a plan to devote the land to an active recreational use or, as Mipro poses the issue, even though Mount Laurel cannot demonstrate a "need" to acquire the particular parcel on which Mipro plans to construct a residential development.

The short answer is that the conservation of land for open space is a public use, even though the government agency acquiring the land has no plans to put the property to any active use. The Green Acres statutes recognize that the State and local governments may acquire land not only for "public recreation" but also "conservation of natural resources." N.J.S.A. 13:8A-2; N.J.S.A. 13:8A-20; N.J.S.A. 13:8A-36. The Municipal Trust Fund Act also authorizes municipalities to acquire land for both "recreation and conservation purposes," N.J.S.A. 40:12-15.2, and defines "conservation" to include "use of lands for . . . open space," N.J.S.A. 40:12-15.1. Similarly, the Garden State Preservation Act declares that "it is in the public interest to preserve as much open space . . . as possible," N.J.S.A. 13:8C-2, and authorizes the exercise of the power of eminent domain for this purpose, N.J.S.A. 13:8C-3. None of these statutory enactments include either an explicit or implicit requirement that a municipality have a plan for the active use of land acquired thereunder or be able to demonstrate a "need" for the acquisition. To the contrary, the manifest legislative intent in authorizing acquisition of land for "conservation" and "open space" is to authorize acquisition for use as passive open space. Thus,

these statutory enactments recognize that open space acquisition may serve the public interest not only by setting aside land for potential future recreational uses but also by preventing development that may aggravate a municipality's traffic congestion and pollution problems and put additional strain on municipal services such as schools.

Our conclusion that a municipality has statutory authority to condemn land to preserve open public space, without any plan to put the land to active use, is supported by *Dolan* v. *Borough of Tenafly*, 75 N.J. 163, 380 A.2d 1119 (1977). In that case, one of the issues was whether a municipality's condemnation for use as open space of the last substantial area of vacant, residentially zoned land within its boundaries was contrary to *Mount Laurel, supra,* 67 N.J. 151, 336 A.2d 713. *Dolan, supra,* 75 N.J. at 169, 380 A.2d 1119. There was no indication that the municipality had a plan to put the land to any active use. Nevertheless, the Court rejected the argument that the acquisition would violate *Mount Laurel,* noting that it served the "vitally important public purpose[s]" of the 1971 and 1975 Green Acres statutes. *Id.* at 175, 380 A.2d 1119.

The trial court's conclusion that Mount Laurel can acquire the Mipro site for open space by negotiation with the owner but lacks authority to acquire the property by eminent domain is inconsistent with the statutes authorizing municipalities to acquire land for open space. These statutes all provide for voluntary acquisition or condemnation as alternative methods by which a municipality may obtain title to land for use as open space. N.J.S.A. 13:8A-6; N.J.S.A. 13:8A-24; N.J.S.A. 13:8A-40; N.J.S.A. 13:8C-3; N.J.S.A. 40:12-15.1. Furthermore, if these statutes were construed not to provide authorization for condemnation of land for open space, it would put the landowner in a position to dictate a purchase price far in excess of the property's fair market value. Therefore, the same public purposes that justify the use of public funds to acquire land for open space by

voluntary acquisition also justify invocation of the power of eminent domain. *Cf. Kelo* v. *City of New London*, -- U.S. --, --, 125 S. Ct. 2655, 2657, 162 L. Ed. 2d 439, 445-46 (2005) (equating "public use" under the Fifth Amendment Takings Clause with a "public purpose").

IV

The trial court concluded that even though Mount Laurel's condemnation of the Mipro site was for the "facially valid purpose" of preserving the site "in perpetuity as . . . passive open space," Mount Laurel was not authorized to condemn the site because the undisputed evidence showed that its motive in bringing this condemnation action was to prevent Mipro's proposed residential development. In reaching this conclusion, the court relied upon statements by the mayor and other public officials in urging Mount Laurel residents to vote for the public referenda authorizing special tax levies for open space acquisition.

"It is well-established that a reviewing court will not upset a municipality's decision to use its eminent domain power 'in the absence of an affirmative showing of fraud, bad faith or manifest abuse.'" *Township of West Orange* v. *769 Assocs.*, 172 N.J. 564, 571, 800 A.2d 86 (2002) (quoting *City of Trenton* v. *Lenzner*, 16 N.J. 465, 473, 109 A.2d 409 (1954), *cert. denied*, 348 U.S. 972 (1955)). "Courts will generally not inquire into a public body's motive concerning the necessity of the taking . . ." *Borough of Essex Fells* v. *Kessler Inst. for Rehab., Inc.*, 289 N.J. Super. 329, 337, 673 A.2d 856 (Law Div. 1995). Whether a taking is for a public use "is largely a legislative question beyond the reach of judicial review except in the most egregious circumstances." *See Township of West Orange* v. *769 Assocs., supra*, 172 N.J. at 576, 800 A.2d 86.

We conclude that even if the primary goal of Mount Laurel's open space acquisition program in general, and the condemnation of the Mipro site in particular, is to slow down

residential development in the municipality, this does not provide a foundation for finding that the municipality's use of eminent domain for this purpose constitutes fraud, bad faith or manifest abuse. Mount Laurel had a reasonable basis for concern that additional residential development would aggravate traffic congestion and pollution problems in the municipality and impose added stress on its school system and other municipal services. Such concerns are reflected in this State's public policy "to halt suburban sprawl." *Mount Olive Complex* v. *Township of Mount Olive*, 340 N.J. Super. 511, 541, 774 A.2d 704 (App. Div. 2001), *remanded for reconsideration*, 174 N.J. 359, 807 A.2d 192 (2002), *decision reaffirmed*, 356 N.J. Super. 500, 813 A.2d 581 (App. Div.), *certif. denied*, 176 N.J. 73, 819 A.2d 1189 (2003). The DEP recognized that Mount Laurel's acquisition of the Mipro site promotes this objective by approving a $400,000 grant for the acquisition. Moreover, although Mount Laurel's governing body has made a policy decision to focus in its open space acquisition program upon parcels that are likely to be the subject of residential development, the properties it acquires under the program nevertheless serve the public purpose of preserving open space.

Furthermore, Mount Laurel is not precluded from acquiring the Mipro site for open space simply because the developer performed site preparation work during the twenty-two-day period between the grant of final subdivision approval and the filing of the declaration of taking. We assume that once its right to acquire title is established, Mount Laurel will restore the site to its natural state.

This is not a case such as *Kessler Institute, supra,* 289 N.J. Super. 329, 673 A.2d 856, in which the court dismissed an action to condemn property on which the owner planned to construct medical rehabilitation and nursing facilities, or the unreported opinion of this court relied upon by respondents that affirmed dismissal of an action to condemn land on which the owner planned to construct a development

that would have provided multi-family housing affordable to middle-income families. In those cases, the condemnees' proposed uses of their properties implicated significant public interests, and the courts found abuses of the eminent domain power in the municipalities' attempts to prevent those uses. If Mount Laurel had attempted to condemn Mipro's property when its predecessor in title planned to construct an assisted living facility on the site, a similar finding might have been warranted. However, Mipro's plan to construct a development of single-family homes that will be affordable only to upper-income families would not serve a comparable public interest.

Finally, we note that there is no indication that the Mipro site was treated differently than other large tracts of vacant land on which residential developments were planned. Mount Laurel's acquisition of the Mipro site is simply one component of a broad-based municipal program for acquisition of additional open space, approved by Mount Laurel's residents in multiple public referenda, in which priority is given to acquisition of properties that are likely to be the subject of residential development. Thus, this is not a case in which a condemnation action ostensibly brought for a legitimate public purpose, such as acquisition of additional open space, was actually brought for a discriminatory reason or other improper motive. Therefore, this case is governed by the general rule that "[c]ourts will generally not inquire into a public body's motive concerning the necessity of the taking or the amount of property to be appropriated for public use." *See Kessler Institute, supra*, 289 N.J. Super. at 337, 673 A.2d 856. Applying this rule, there is no basis for a finding of abuse of the eminent domain power in Mount Laurel's condemnation of the Mipro site.

Accordingly, the final judgment dismissing Mount Laurel's complaint is reversed and the case is remanded to the trial court to appoint condemnation commissioners to value the property. Because the post-judgment order

awarding Mipro counsel fees, costs and other expenses was based on the dismissal of this condemnation action, *see* N.J.S.A. 20:3-26(b), which we have determined Mount Laurel is entitled to maintain, that order also is reversed.

## APPENDIX C

NOT FOR PUBLICATION WITHOUT THE APPROVAL OF THE COMMITTEE ON OPINIONS

| | | |
|---|---|---|
| **MOUNT LAUREL TOWNSHIP,** | : | **SUPERIOR COURT** |
| | : | **OF NEW JERSEY** |
| | : | **LAW DIVISION** |
| **Plaintiff** | : | **BURLINGTON** |
| | : | **COUNTY** |
| **vs.** | : | **DOCKET NO. 1-1745-02** |
| **MIPRO HOMES, L.L.C., LORRAINE C. ELBON, and 190 Elbo, L.L.C.,** | : | **Civil Action** |
| **Defendants** | : | **OPINION** |
| **BUILDERS LEAGUE OF SOUTH JERSEY, INC.,** | : | |
| **Intervenor** | : | |

On May 24, 2002, the Township of Mount Laurel ("Township" or "Mount Laurel") filed a Verified Complaint and Order to Show Cause seeking to condemn property owned by Mipro Homes, L.L.C. ("Mipro") known as Block 600, Lots 2.0, 2.03 and 2.05 on the Official Tax Map of Mount Laurel Township, also known as High Pointe Estates. Mipro answered on June 14, 2002 and filed a motion returnable June 21, 2002, also the return date of Mount Laurel's Order to Show Cause, seeking an order denying the relief sought by Mount Laurel, namely, the right to condemn and the appointment of commissioners. Mipro also requested discovery. Mipro's relief was granted by Order dated September 10, 2002.

Builders League of South Jersey ("BLSJ") moved to intervene. That application was granted on August 2, 2002. Subsequently, on August 29, 2002, a discovery order was entered allowing Mipro's counsel to depose certain Mount Laurel officials and to serve a Demand for Production of

Documents. Thereafter, cross-motions for summary judgment were filed and the matter was orally argued before the court on May 27, 2003.

The property in question consists of 16.43 acres and is zoned for residential use. On July 30, 2001, Mipro executed an agreement to purchase the property from 190 Elbo, L.L.C. Mipro's application for Conditional Preliminary Major Subdivision Approval was granted by the Mount Laurel Township Planning Board on May 10, 2001 and the Resolution memorializing that approval was adopted on June 14, 2001. The approved plan called for 23 single family building lots on which Mipro intended to build houses in the $400,000.00 to $450,000.00 range. The purchase by Mipro was consummated on August 30, 2001. In February, 2002, after the conditions of the initial approval were satisfied, Mipro applied to the Planning Board for Final Major Subdivision Approval. Following a hearing before the Board on May 9, 2002, the application was granted. Site work, consisting of clearing, grading, excavation for sewer and stormwater lines, a retention basin and the stockpiling of dirt, began immediately thereafter.

In early December, 2001, several months after the initial approvals were obtained, Mount Laurel adopted a resolution authorizing an application for Open Space Preservation Funding to the Burlington County Board of Chosen Freeholders. Appraisals were prepared by J. McHale & Associates dated February 11, 2002, and Renwick and Associates dated February 27, 2002, each using an evaluation date of January 21, 2002. On April 1, 2002, Ordinance 2002-4 was introduced. It authorized the acquisition of Mipro's property based upon a completed "qualification for the Green Acres Incentive Grant Program within the New Jersey Preservation Trust" and contained a determination by the Township Council that the property "is under severe development pressure" and "has been made the subject of a major residential subdivision application." The Ordinance

also recites that the property is "within Mount Laurel Township's open space inventory."

Unilateral discovery was taken by Mipro which included the production of documents from the Township as well as depositions of George Morris, Deputy Manager of the Township, John Maczuga, formerly employed by Bay Pointe Engineering as director of planning, Louis Glass, township planner for 17 years, and Harry McVey, a partner in Louis Glass Associates.

Mount Laurel maintains that two distinct legislative enactments justify its condemnation of Mipro's property even though the only "public purpose" of the acquisition is to "conserve" the property in its natural state and there is no present or reasonably foreseeable "need" for the property for any specific public purpose. Those enactments are N.J.S.A. 40:12-15.1, et seq. approved February 28, 1997, and N.J.S.A. 13:8C-1, et seq. effective June 20, 1999. The first of those laws provides that a governing body of a municipality may submit to the voters a proposition authorizing the imposition of an annual levy for the purpose of acquiring, developing and maintaining lands for recreation and conservation purposes, acquiring farm land for preservation, the historic preservation of historic properties and the payment of debt service related thereto. The second enactment which establishes the Garden State Preservation Trust, contains legislative findings that enhancing the quality of life of the citizens of New Jersey is a "paramount policy" and that acquisition and preservation of open space, farm land and historic properties enhances the character and beauty of the State, providing "its citizens with greater opportunities for recreation, relaxation and education; that the lands and resources now dedicated to these purposes will not be adequate to meet the needs of an expanding population in years to come; . . . and that *it is necessary and desirable to provide funding* for the development of parks and other open space for recreation and conservation purposes." (Emphasis

added.) Mount Laurel points to that portion of the Act which states that

> "The Legislature therefore determines that it is in the public interest to preserve as much open space . . ., as possible within the means provided by the 1998 constitutional amendment; . . ."

Mount Laurel argues that N.J.S.A. 13:8C-1, et seq. generally provides for and "specifically articulates" the definition of "development easement" in terms of the interest of the public in "stopping development." The Township contends that "stopping development" is not only permissible but is, in itself, a laudatory goal which does not run afoul of either the Municipal Land Use Law (MLUL) or the Eminent Domain Act of 1971, N.J.S.A. 20:3-1, et seq. Essentially, it is Mount Laurel's position that the law authorizing referenda and the Preservation Trust Fund are instruments which allow the Township to take properties under development if the sole goal is to preserve the land in perpetuity and the stopping of development is a legitimate collateral consequence of such taking. In furtherance of its goal to acquire as much land, under severe development pressure, as possible, Mount Laurel placed three referenda on the ballot in the years following enactment of the enabling legislation. Each passed overwhelmingly by the voters resulting in the imposition of a tax levy dedicated specifically to the acquisition of open space properties by purchase rather than condemnation. As a result, it is undisputed that Mount Laurel has negotiated the purchase of numerous properties which were developable. Indeed, the deposition testimony of George Morris supports that conclusion: "We were trying to buy as much as we could for the dollars that the Township residents had provided, that the County would help fund, and the State would help fund . . . And then we would have the ability in the future to evaluate if we needed active or passive recreation . . . We understood that if we purchased one property a year over 20 years there wouldn't be anything to

buy in those last 10 years because land is so scarce here in Mount Laurel."

Mipro has maintained from the outset that the sole purpose of the taking is to halt the specific development of 23 houses on the property in question, a motive not condoned by the law of condemnation or the Municipal Land Use Law and not supported by the enactments alluded to by Mount Laurel. Mipro argues that those enactments are merely funding mechanisms for the purchase of open space from willing sellers and not the taking of private property from persons unwilling to sell their properties. In support of its opposition to the condemnation, Mipro presents what it considers to be powerful and overwhelming evidence that the Township has embarked upon a crusade to stop development under the guise of conservation, a motive that is absolutely prohibited by our case law.

The evidence presented to this court by Mipro is undisputed. It consists primarily of deposition testimony and documents produced by the Township in answer to discovery requests or previously produced by way of a rather substantial appendix to the Township's initial brief in support of its Order to Show Cause. Examples of Mipro's evidence concerning improper motive by the municipality include: (1) Signs throughout the Municipality on property purchased for open space read: "More Acres Saved From Development—Your Open Space Dollars At Work." (2) On January 7, 2002, at the reorganization meeting of the Township Council, outgoing mayor, Geraldene Nardello said that: "We have identified other residential subdivisions with preliminary approvals adjacent to the intersection of Hainesport Road and Elbo Lane. As on Hooten Road, *we have interfered with the plans of the developers who have already received preliminary approval. We will continue to do so until the taxpayers acquire the land and it remains open space forever."* (Emphasis added.) (3) Various newspaper articles quote the Township Solicitor as stating that the Township's

goal is to "protect the land from development" and to actively acquire land "slated for development." (4) George Morris, in his deposition, testified that he was primarily responsible for the day-to-day handling of open space issues from the Winter and early Spring of 1998. He said that he never consulted with the Planning Board in regard to the Master Plan and that he "assume[d] that the Township's interest was in potentially reducing the number of residential units in the Township . . ." He testified that when he prepared the list of properties for acquisition, he did not consider whether those parcels could be used for open space recreation but only that they could be used for passive purposes. He confirmed that no study was undertaken to determine how much passive open space was needed in Mount Laurel or what the active open space needs were. He was asked: "How did you evaluate when you have enough active recreation? How did you make that analysis?" He answered: "I think the governing body will make that analysis when the voters tell them enough is enough." Regarding a plan for the acquisition of property, Morris testified that he "didn't produce the master plan . . . No, I did not consult the master plan." The Township planner, "Mr. Glass[,][was not involved] in the process because he was not supposed to be part of the process." Insofar as a benefit to the Township was concerned, Morris stated: "The acquisition of properties that's residentially zoned served the purpose of increasing our open space and it had the benefit of removing the potential that homes could be developed there." He confirmed that no properties other than High Pointe Estates "have become the subject of eminent domain complaints." As to the amount of property to be acquired under his plan, Morris stated: "We haven't set a maximum goal." When asked if there was a minimum goal, he answered: "No." Regarding the letter sent to all residents by Mayor Nardello, Morris was asked: "Is the implication as I suggested that there would be a savings to the residents of Mount Laurel if residential property was acquired as open space and not

developed? Is that a fair reading in your opinion of that?" He answered: "A fair reading is if homes are developed there would be a significant cost." (5) John Maczuga testified that his company, Bay Point Engineering, was hired to do an "open space and recreation plan geared . . . to . . . the State's Planning Incentive Grant Program . . ." He also testified that there was no rating or ranking system by which properties were prioritized for acquisition, that he relied exclusively upon the Township for that information without knowing specifically who or which subordinate boards were formulating those decisions. His instructions were "to be very aggressive in terms of open space acquisition . . ." "They were concerned that they had placed open space acquisition on the back burner for a long time, and they had a lot of catching up to do." Fairly early on in the process, he had obtained information as to which properties had development approvals. He explained why the Township was not interested in the Mipro parcel previously: "It's my understanding now that it was going to be an assisted living facility. It was long in the process, and had some Mount Laurel [Mount Laurel II] significance, affordable housing significance to the Township." Concerning "need," he was asked: "Okay. Do you have an opinion, if any, whether additional open space is needed in Mount Laurel Township; needed?" To which he answered "Needed? . . . I can't—I have not empirically analyzed that situation, other than what we did in the open space and recreation plan itself and there was a need." (6) Louis Glass, who serves as a Township planner for both the planning board and zoning board of adjustment for nearly 27 years, testified that he prepared most of the 2000 Master Plan except for the portion on Recreation and Open Space which was copied from work done by Bay Point Engineering. That portion of the Master Plan was not amended by the Planning Board until January 9, 2003 and it contained no projected "need" for open space, reciting only that the Township had 814 acres of open space dedicated to public use. Mr. Glass acknowledged that the

Master Plan contains a statement on Page L-2 as follows: "Therefore, the Township is in an excellent position to provide park and recreation land under this standard" (referring to the Population Methodology of Computing Open Space Need). Quoting further, Mr. Glass said: "By combining the public and school lands, the Township now has 721 acres available which is well in excess of the amount of land needed according to the standard." When questioned concerning the application of the Percentage of Area Method of determining the need for open public space, Glass stated: "That paragraph on the Percentage of Area Method says using that method Mount Laurel would need 425 acres of local parks and then it concludes with the sentence 'at the current time, the township has a two hundred and ninety-six acre surplus using this method.'" Regarding the dedicated funding source available to Mt. Laurel as a result of the referenda passed by the electorate, the following colloquy occurred:

> "A. Since the township now has a dedicated funding source, all parcels are subject to potential open space acquisition.
>
> Q. Mr. Glass, am I correct or would I be correct in reading that any undeveloped parcel now under the master plan amendment could be acquired for open space?
>
> A. Correct.
>
> * * *
>
> Q. One more question, Mr. Glass. Do you have any knowledge whatsoever as to what use the township proposes to put the parcels that it has acquired since the 2000 Master Plan, what use specifically they will put the parcels to?
>
> A. No."

This matter lends itself to disposition by summary judgment. In fact the parties agree that there exists no material factual dispute. Rather it is the interpretation of those facts as they have been applied in a widely disparate way to controlling case law that is disputed. Nonetheless, I am satisfied that no fair minded fact finder could reach but a single conclusion. *Brill* v. *Guardian Life Insurance Company of America*, 142 N.J. 520 (1995).

My analysis must begin with a review of the governing principles of law. According to both the United States Constitution and the Constitution of New Jersey, a governmental entity is permitted to take private property for public use in exchange for just compensation. U.S. Const., amend V, amend XIV; N.J. Const., Art. I, Par. 20, *State* v. *Silver*, 92 N.J. 507, 513 (1983). Since condemnation is exclusively a legislative function, broad discretion is granted to condemning authorities to determine what property and the amount of property are to be taken. *State* v. *Lanza*, 27 N.J. 516, 530 (1958); *Twp. of West Orange* v. *769 Acres*, 172 N.J. 564, 571 (2002); *Texas Eastern Transmission Corp.* v. *Wildlife Preserves, Inc.*, 48 N.J. 261, 269 (1966); *Borough of Essex Fells* v. *Kessler Inst.*, 289 N.J. Super. 329, 387 (Law Div. 1995). As a general rule courts will not inquire into a condemnor's motive or the necessity for the taking. *Ibid.* Consequently, when a governing body adopts an ordinance in the exercise of its power of eminent domain, that determination is presumed valid. *Taxpayers Assoc.* v. *Weymouth Township*, 71 N.J. 249, 264 (1976). Courts will only consider evidence concerning the legislative purpose, in the context of a facially valid ordinance, "when the reasonableness of the enactment is not apparent on its face." *Riggs* v. *Twp. of Long Beach*, 109 N.J. 601, 613 (1988). The party asserting fraud, bad faith, abuse of discretion or arbitrary or capricious action has the heavy burden of proof, *State* v. *Malibu Beach, Inc.*, 209 N.J. Super. 291, 296 (Law Div. 1986), by clear and convincing evidence. *Essex City Improvement Authority* v. *RAR Dev. Assoc's*, 323 N.J. Super.

505, 516 (Law Div. 1999). Courts will not enforce a decision to condemn if the condemning authority has acted with "improper motives, bad faith or some other consideration amounting to a manifest abuse of the power of eminent domain." *Borough of Essex Fells, supra* (quoting *Tennessee Gas Transmission Co.* v. *Hirshfield*, 39 N.J. Super. 286, 288 (App. Div. 1956). Thus, a condemnation may be set aside when a public body condemns for an authorized purpose, but is motivated by an ulterior, disguised purpose which is not authorized by law. *Essex Fells, supra*, at 338.

Bad faith "generally implies the doing of an act for a dishonest purpose," and also contemplates ill will. *Id.* at 338. Bad faith exists when there is a valid purpose for taking property, but the condemning authority is motivated by reasons beyond the power conferred by law, i.e., a pretext.

With these general principles in mind, I must now engage in a detailed analysis of the cases relied upon by the parties in this litigation. I begin first with *Borough of Essex Fells* v. *Kessler Institute*, 289 N.J. Super. 329 (1995). Essex Fells is a small borough and 20% of its land is devoted to municipal, park and other open space. Kessler is a non-profit rehabilitation facility which provides treatment and services to people with physical disabilities in 3 north Jersey towns. It looked to Essex Fells to establish a skilled nursing facility and transitional living facility consisting of 20 units. The parcel selected by Kessler is 12.5 acres adjacent to a 68 acre parcel of municipally owned land, mostly wooded and containing the borough's wells and water recharge area. There are several buildings on the tract which is zoned for educational use. The borough purchased approximately 2.5 acres for a soccer field and its officials actively sought residential developers to buy the balance of the property and to construct single family houses. A year before the borough bought the acreage for a soccer field, its planner wrote a report suggesting that the educational zoning be amended to residential, but there was no recommendation that the

borough acquire it for any purpose. When Kessler expressed an interest in the property, the mayor said to Kessler representatives that the town "had never wanted anything but single family housing" there. Kessler, nevertheless, signed a purchase agreement for the parcel and applied to the planning board for conditional use amendment of the zoning ordinance. Public sentiment expressed at the planning board meetings was clearly against Kessler's proposal. The borough's retained expert planner and land use attorney found Kessler's proposal appropriate prompting the mayor and council to authorize the preparation of a zoning ordinance amendment to allow Kessler's development. Local citizens formed the Essex Fells Preservation Committee which conducted several rallies in opposition to the plan and distributed a flyer opposing the mayor and council as well as making highly discriminatory comments about persons with disabilities. As a result of this pressure, local officials decided to send a questionnaire to each residence rather than amending the ordinance. It asked whether they would pay additional taxes to purchase the property for park land. The results were 3 to 1 in favor of acquisition. A resolution authorizing the purchase was passed and an offer to purchase was extended to Kessler. The offer was rejected and Kessler immediately applied for a zoning variance. The borough adopted an ordinance authorizing condemnation of the property and the court thereafter stayed proceedings on the condemnation complaint pending resolution of Kessler's bad faith claim. The zoning board of adjustment thereafter denied Kessler's application for a zoning variance.

The trial court, recognizing the general principle that courts will not ordinarily inquire into a public body's motive concerning the necessity of a taking or the amount of property to be acquired for public use, *Riggs* v. *Long Beach Twp.*, 109 N.J. 601, 613 (1988), determined that a decision to condemn shall not be enforced where there has been a showing of "improper motives, bad faith, or some other consideration amounting to a manifest abuse of the power of

eminent domain." *Tennessee Gas Transmission Co.* v. *Hirschfield, supra.* The court determined that "public bodies may condemn for an authorized purpose but may not condemn to disguise an ulterior motive." Citing numerous cases from other states, there having been in New Jersey at the time for that proposition, Judge Fuentes said:

> "These cases made it clear that where a condemnation is commenced for an apparently valid, stated purpose but *the real purpose is to prevent a proposed development which is considered undesirable, the condemnation may be set aside.*" (Emphasis added.)

Applying those principles of law to his understanding of the record before him, Judge Fuentes concluded that the proposed taking of Kessler's land for a public park:

> ". . . was . . . not based on a public need but in response to community opposition to Kessler's proposed use of the property."

Engaging in the fact sensitive analysis required in such situations, the Judge alluded to statements of public officials such as, "I would not prefer to have Kessler Essex Fells, okay?" and "You've got to condemn and you've got to develop a public need . . . we've got to come up with a need that the court will allow." He also concluded that his review of the record failed to disclose "any public discussion, debate or demand for any additional park land or open space until public opposition to Kessler's development plans intensify." The judge dismissed the complaint, being "clearly convinced from the . . . record . . . that the borough proceeded to condemn . . . Kessler's development . . ."

Plaintiff and defendant each cite the unpublished opinion in *Township of North Brunswick* v. *U.S. Homes Corporation*, A-2929-1T2 (App. Div. 2003) in support of their opposite positions. There the property in question was 105 acres of farm land zoned I-2 industrial and Plaintiff was the contract purchaser. In 1989, the governing body approved the open

space and recreation element of its 1984 master plan which included a recommendation that the municipality acquire an additional 109 acres for active recreation space to include baseball, softball, football and soccer fields as well as basketball, tennis and volleyball courts. The plan was based upon a standard adopted by the Department of Community Affairs and the National Recreation and Park Association of 8 acres per 1000 persons for developed recreational areas. The 1989 plan specifically identified the property in question as an alternate site in the event that other sites deemed more suitable were unavailable. The 1994 reexamination report recommended rezoning the property in question to agricultural-low density residential to allow for single family houses on 6 acre lots. No rezoning occurred because farming operations continued. In 1994, the governing body was opposed to any development of the site. That sentiment was expressed in a formally adopted resolution. Defendant acquired an interest in the property in 1997 and presented a concept plan in 1999 for senior citizens housing to the planning board. The board acquiesced and submitted a draft ordinance to the governing body to rezone the property as a Planned Retirement Community. Four months before, the township adopted a resolution to ask the voters to approve a 3 cent per $100 assessed value tax to fund an open space preservation program. At the November 1999 election, the referendum was approved after which the township adopted an ordinance that created an Open Space Committee, the purpose of which was to "recommend open space acquisitions and programs." In September 2000, U.S. Homes applied for a use variance. In October 2000, the township's expert environmental consulting engineering firm submitted its plan for recreation and open space which showed a need for additional recreational facilities "as soon as possible." At that time, the township only had about 40% of its recommended active recreation area. This was based upon a need for 125 more acres to meet year 2000 needs and more land for projected needs for 2015. Further, there was an

"extreme overuse" of existing facilities and the report made acquisition of the site the "township's number one priority."

Public hearings were conducted and the plan was referred to the planning board for inclusion in a revised recreation and conservation element of the master plan. The planning board held a hearing at which U.S. Homes admitted that more recreational space was needed. The master plan was thereafter amended and the concept plan was developed to include 6 little league softball fields, 4 baseball fields and 5 soccer fields. A $15,000,000.00 bond ordinance was adopted and $6.5 million was offered to U.S. Homes for the site.

U.S. Homes alleged "bad faith" on the part of the township, asserting that its sole aim was to stop development. The Appellate Division set forth the same basic legal principles as did Judge Fuentes in *Essex Fells*. The court said the record before it was "in strong contrast" to that in *Essex Fells* because the township was able to substantiate, by way of history, the need for more recreational and open space. It determined that there was no requirement for an evidentiary hearing because the record before it had been fully developed. The court agreed with the trial judge's conclusions that "the municipality had the discretion to decide not to convert existing passive recreation areas into athletic fields," a decision not subject to judicial interference. It would have been "impractical to convert undeveloped conservation areas into active recreational facilities because they 'are dedicated water shed areas or wetlands,' [and] almost all are wooded." The various sports programs attracted significant numbers of children: soccer—850; youth football—260; and baseball and softball—780. The court concluded that the record before it showed at most a disagreement between the municipality and a private developer regarding open space requirements "and the dynamic and often controversial subject of land use public policy"—"the type of public policy dispute our system

assigns to resolution by the politically responsive branches of governments, not to courts.

A second unpublished opinion is also relied upon by the parties to this litigation to support opposite conclusions. That case is *Twp. of Monroe* v. *Noonan*, A-1443-99T1, A-1512-99T1, A-1515-99T1 (App. Div. 2001). It is a case in which appellants challenged a Law Division determination that Monroe Township acted properly in condemning their properties for open space and park use. The Appellate Division reversed. The site consisted of 10 undeveloped acres in the R-30 Residential District. In 1997, Consolidated Affiliates, L.L.C. agreed to purchase the property subject to approval by the zoning board for a Walgreens Drug Store. However, the application was never heard because of procedural problems. Applications for a funeral home, service station and repair shop were denied, withdrawn or dismissed without prejudice. The township began to consider acquisition only because of the "diverse, and non-conforming nature of the applications" being made to the zoning board of adjustment and the fact that neighboring residents expressed a preference for a park. The township engineer prepared a concept plan for a "conservatory" with a walking park and trails. The township adopted an ordinance to condemn the tract "purportedly in furtherance of the township's master plan goal of producing adequate open space and recreational facilities for present and future use." Appellants retained an expert planner who opined that the condemnation was actually for a "private purpose . . . as a buffer which . . . is not a public purpose especially in the context of a recently adopted Master Plan and even more recently adopted Open Space Plan which target and prioritize other areas . . . ."

The Appellate Division again set forth the guiding principles which govern condemnation actions and reiterated that the burden of proof is on the party asserting bad faith to show ill will or motive by clear and convincing evidence. The court determined that the stated purpose for acquiring

the site for open space and park use was a pretext for the improper purpose of precluding commercial development on the site. This was based, in part, on the engineer's certification that residents preferred a park rather than a commercial use. Moreover, the master plan was adopted shortly before the condemnation but made no reference to the "possibility or desirability of acquiring the subject site for park use or open space." Finally, the Open Space Plan did not mention the site. The interest in acquisition was prompted solely by the proposals to develop the site commercially.

In applying the law to the facts of this case, I do so by acknowledging at the outset that the site in question is zoned for residential use and that the applications filed by Mipro for development of the tract sought no variances. Secondly, it is apparent that the condemnation was commenced for a facially valid purpose, namely, the acquisition of Mipro's tract to be held in perpetuity as a passive open space. I am satisfied, however, by quite clear and convincing evidence in the record before me that the real purpose was to prevent yet another residential development in a township already under severe development pressure. As in *Essex Fells, supra*, the credible evidence here demonstrates that the public purpose articulated for the taking of Mipro's property for passive open space was not based on a true public need but solely in response to the community's sentiment expressed at the polls, coupled with clear indications from township officials, that the property be acquired to stop residential development. The impetus for the acquisition was not a real need for more open space but was the granting of Mipro's application for major subdivision approval on May 10, 2001. The Township's resort to N.J.S.A. 13:8C-1, et seq. and N.J.S.A. 40:12-15.1, et seq. as a basis to justify the taking of Mipro's property, specifically, is totally misplaced. Those enactments, while setting forth a strong public policy encouraging municipalities to acquire and preserve land, are basically funding mechanisms by which a municipality can gain access

to matching funds or dedicated tax funds for the purpose of *purchasing* open space and recreation areas. Those laws do not in any way supercede the Municipal Land Use Law and the Eminent Domain Act of 1971. Condemnation cannot replace planning and zoning. Those concepts are governed by the MLUL. The Eminent Domain Act of 1971 requires that there be both a public need and a public purpose for the acquisition of private property.

I will first discuss the evidence which I conclude to be overwhelming on the issues of "need" for Mipro's site and "public purpose" for the acquisition. Without providing the same detail as I did earlier in this opinion, I refer once again to the deposition testimony of township officials and its retained experts. George Morris, a man of relatively little experience in the area of eminent domain, was made primarily responsible for the day-to-day management of open space issues. It is obvious from his testimony that he was on a quest, initiated by township officials, to purchase as much open space as budgeted funds from dedicated tax levies and matching funds could buy. There was no open space plan from which he worked, no coordination with the planning board or consultation of the Master Plan, and certainly no prioritization or ranking of properties desirable for and needed for recreation and open space of either an active or passive nature. In fact, Mr. Morris was working on the assumption "that the Township's interest was in potentially reducing the number of residential units [to be constructed] in the Township . . ." The list of properties he prepared had little to do with actual need, present or future, because he did not consider whether the parcels on the list could be used for recreation or passive open space. There was no study or report from which he sought or could receive guidance as to the amount of active and passive open space needed, if any. His answer to one question bears repeating: "I think the governing body would make that analysis when the voters tell them enough is enough." He never consulted the Township Planner, Louis Glass, who he described as "not in

the process." He confirmed that only High Pointe Estates had become the subject of a condemnation complaint even though other developing and developable parcels remained free of the condemnation process.

John Maczuga conceded that the Township had no interest in the Mipro site when it had been approved for an assisted living facility, clear evidence that the Township had a preference for that type of development rather than a residential one. There had been much public commentary by council members prior to the condemnation reflecting concern that residential development produced little by way of tax ratables to offset the rising cost of education and other municipal services.

Moreover, the various methods used to calculate "need" for open space, be it for active or passive use, were conclusive that Mount Laurel has more than is required for its citizens' use. The Master Plan was not amended until January 2003. As amended it referenced no projected "need" for additional open space. Louis Glass confirmed in his deposition testimony that present open space acreage well exceeded the amount necessary for Mount Laurel's population. Simply put, he said that the Township's approach to open space acquisition is to buy all the land it can with available funding. "Need" was not a part of the equation.

The public comments by the Mayor and other Council Members coupled with signs around the Township declaring that more land has been spared from development is further evidence that the primary goal of Mount Laurel is to acquire property to stop development, a collateral consequence of which is preservation of open space. However, the preservation of that open space is not even a secondary goal. The savings of tax dollars for educational purpose and other municipal services appears clearly to be the objective.

Finally, the fact that Mount Laurel's voters approved three referenda for dedicated taxes is nothing more in this

case than a form of public sentiment or outcry in support of the Township Officials' efforts to halt residential development. Such public sentiment is an appropriate consideration

> "... in formulating a Master Plan or enacting a Zoning Ordinance ... it is not a proper factor in condemnation. The only justification for condemning a person's real property is to fulfill a public purpose or need. It is the public purpose of need which impels the condemnation. The condemnation cannot be used as a pretext to discourage or prevent a particular use of property. That is the function of the Master Plan and Zoning Ordinance. In short, condemnation . . . is not a means to achieve zoning . . ." *Township of Monroe* v. *Noonan*, *supra*, at pg. 8.

It cannot be overlooked in this litigation that Mount Laurel initially gave serious consideration to rezoning portions of the township to achieve the goal of reducing the impact of residential development. For reasons which do not appear in the record, however, Mount Laurel opted to purchase properties rather than to engage in an appropriate re-examination and reformulation of its Master Plan and Zoning Ordinance. There is nothing legally wrong with the chosen approach as long as the township *purchases* the property from a willing seller. The abuse of discretion and arbitrary, capricious and unreasonable action by the Township occurred when it abused the awesome power of eminent domain for a purpose not contemplated by, and indeed proscribed by, our Eminent Domain Law. This case falls squarely within the prohibitions of *Essex Fells* and *Township of Monroe* v. *Noonan*. It is also distinguishable from *North Brunswick* v. *U.S. Homes Corp.* in which the court upheld a condemnation. In that case, there was a "plan" which showed an immediate need for significant open space. The Township had met only 40% of its open space requirements and there was an "extreme overuse" of existing

recreational facilities making acquisition the "Township's number one priority." None of that is present here. There, too, the planning board had a very active role. The "plan" was referred to that Board which then revised the recreation and conservation element of the Master Plan after conducting public hearings. None of that happened here. The hearings which were conducted were done by the Township Council, obviously the inappropriate body for such action. Indeed, the Planning Board in Mount Laurel was not even consulted. In *North Brunswick*, U.S. Homes conceded that a need for more recreational space actually existed. Here, Mipro does not and should not, because there has not been shown that a "need" does exist. The overwhelming evidence in the record is to the contrary. Mount Laurel's needs have been satisfied. In short, the condemnation here can best be described as a random taking without legal justification. If the Township desires to continue to purchase property for open space, it may do so. Those purchases may only be made from willing sellers, not by resort to condemnation of tracts under development from private owners unwilling to give up their properties and vested approvals.

For the foregoing reasons, the Complaint in Condemnation is dismissed and the Order to Show Cause is discharged. The evidence shall be retrieved by counsel for Mount Laurel pursuant to R. 1:2-3. Mr. Baron shall prepare the order.

JOHN A. SWEENEY, A.J.S.C.

FILED
JUN 6 - 2007
OFFICE OF THE CLERK
SUPREME COURT, U.S.

No. 06-1345

IN THE

# Supreme Court of the United States

MIPRO HOMES, L.L.C. and
BUILDERS LEAGUE OF SOUTH JERSEY, INC.,

*Petitioners,*

*v.*

MOUNT LAUREL TOWNSHIP,

*Respondent.*

ON PETITION FOR A WRIT OF CERTIORARI TO THE
SUPREME COURT OF NEW JERSEY

## BRIEF IN OPPOSITION

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## OBJECTION TO PETITION FOR A WRIT OF CERTIORARI

Mount Laurel Township (hereinafter "Township") respectfully responds and objects to the Petition for a Writ of Certiorari.

## STATEMENT OF JURISDICTION

Jurisdiction pursuant to 28 U.S.C. § 1257(a) should not be invoked. There were no federal questions presented below. All State court decisions were based upon New Jersey law. Mount Laurel Township (hereinafter "Township") articulates its objection to the Court's jurisdiction pursuant to Rule 15.4.

## CONSTITUTIONAL PROVISION INVOLVED

Petitioners assert violation of the Fifth Amendment to the United States Constitution. The assertion itself is new to this litigation. The Fifth Amendment has not previously been asserted or argued in any pleadings or subsequent briefs filed in any New Jersey court.

All decisions below referenced the eminent domain statute of the State of New Jersey, State court decisions applying the statute and recently adopted preservation of land statutes.

There are no statutes of the United States, constitutional provisions or treaties of the United States affecting this matter.

## STATEMENT OF THE CASE

Pursuant to the Township's open space acquisition program, the Township determined to preserve the property involved here. The preservation will be in perpetuity. The matter was initiated by the Township's complaint condemning the property. No issues were raised by the condemnee regarding just compensation provisions of either federal or New Jersey law. Summary judgment was entered in favor of condemnee because the trial court determined the taking to be in bad faith. The Township appealed to the New Jersey Superior Court, Appellate Division. The Township's brief to that court included a demonstration of extensive errors of fact and law articulated by the trial court. The Superior Court, Appellate Division reversed the Law Division. Defendant appealed to the New Jersey Supreme Court. The State's highest court sustained the Appellate Division in a Per Curium decision. All opinions are in the Appendix.

## REASONS FOR DENYING THE PETITION

The greatest portion of State law applied below is statutory. None of those statutes, their purposes or their requirements are addressed or mentioned in the Petition.

Petitioners have not previously asserted a taking without just compensation. In fact, just compensation aspects of this case have not yet been reached.

The New Jersey Supreme Court determined the property was taken for a public use and a public purpose. It did so because of land preservation statutes adopted by New Jersey.

**A. The New Jersey Preservation Statutes.**

Three separate State statutes support the taking. Two of the three were adopted soon before the Township's pursuit of this property. These two statutes are open space preservation enactments by the country's most densely populated State. The third, the New Jersey Eminent Domain Act, N.J.S.A. 20:3-1 *et seq.* is the general condemnation statute of the State.

N.J.S.A. 40:12-15.1 *et seq.* was adopted in 1997. Often referred to as the Referendum Law, it gives to municipalities and counties the right to seek approval for a dedicated tax to acquire "lands for recreation and conservation purposes;" N.J.S.A. 40:12-15.7. The dedicated tax must be approved by a majority of voters at a November general election. In the Referendum Law, supra, "acquisition" is defined:

> The securing of a fee simple or a lessor interest in land, including but not limited to an easement restricting development, by gift, purchase, installment purchase agreement, devise, *or condemnation.*

Emphasis added. N.J.S.A. 40:12-15.1.

N.J.S.A. 13:8C-1 *et seq.*, the New Jersey Preservation Trust Act, was adopted in June 1999. The legislative purpose provisions assert, in part:

> The Legislature *finds and declares* that enhancing the quality of life of the citizens of New Jersey is a *paramount policy* of the State; that the acquisition and preservation of open space,

> farmland and historic properties in New Jersey protects and enhances the character and beauty of the State and provides its citizens with greater opportunities for recreation, relaxation and education; that the lands and resources now dedicated to these purposes will not be adequate to meet the needs of an expanding population in years to come; that the open space and farmland that is available and appropriate for these purposes will gradually disappear as the costs of preserving them correspondingly increase; and that it is necessary and desirable to provide funding for the development of parks and other open space for recreation and conservation purposes.

Emphasis added. N.J.S.A. 13:8C-2.

Also asserted is:

> The Legislature further finds and declares that the citizens of the State have indicated their very strong support for open space, farmland, and historic preservation efforts not only in the past approval of State Green Acres bond acts and numerous county and municipal dedicated funding sources for those purposes, *but most recently in 1998 with the approval of an amendment to the New Jersey Constitution that provides for a stable and dedicated source of funding for those purposes for the next decade and beyond.*
>
> *The Legislature therefore determines that it is in the public interest to preserve as much open space and farmland, and as many historic properties,*

> *as possible within the means provided by the 1998 constitutional amendment*; that, in recognition of the recommendations of the Governor's Council on New Jersey Outdoors, it is a worthy goal to preserve one million more acres of open space and farmland in the Garden State in the next decade to protect the quality of life for New Jersey residents; and that, to accomplish that goal, it is also in the public interest to create the Garden State Preservation Trust and to enable it to raise revenue for those purposes, and to delegate to it such other duties and responsibilities as shall be necessary to further the purposes of the *constitutional amendment* and to advance the policies and achieve the goals set forth in this preamble.

Emphasis added. N.J.S.A. 13:8C-2.

The Act provides a slightly different definition of "acquisition":

> The obtaining of a fee simple or lessor interest in land, including but not limited to a development easement, a conservation restriction or easement, or any other restriction or easement permanently restricting development, by purchase, installment purchase agreement, gift, donation, *eminent domain* by the State or *a local government unit*; . . .

N.J.S.A. 13:8C-3 (emphasis added).

These land preservation statutes form the foundation of the lower courts' determinations of correctness of the acquisition here, i.e., preservation of open space is a valid public purpose in New Jersey. Petitioner's asserted comparisons of New Jersey law to the law of other States fails to include or mention New Jersey's statutory language or its purposes. The Petition's suggestion of resolving inconsistencies among various States' laws is therefore not based upon any analysis of relevant statutes, whether from New Jersey or from any other State.

**B. The Township Had A Comprehensive Plan.**

Petitioners repeatedly assert the Township had no "comprehensive plan." The quoted language comes from *Kelo, et al. v. City of New London, et al.*, 545 U.S. 469 (2005). *Kelo* found a proper public purpose in the pursuit of economic revitalization by New London, Connecticut. In *Kelo*, the Court reviewed—or rather the Court noted with approval—the comprehensive plan pursued by New London. Relevant Connecticut statutes reveal that New London's "plan" followed the recipe required.

Petitioner's assertion about the absence of a plan here is entirely incorrect. The Township's plan is based upon the New Jersey preservation statutes aforementioned and regulations pursuant thereto at N.J.A.C. 7:36-1.1 *et seq*. The Township properly pursued, and achieved, full compliance with every requirement. The Township's plan was achieved through the required process, is complete and as comprehensive as required. These required planning activities and procedures included:

1. The Township placed three separate ballot referenda before its voters in November of 1998, 2001 and 2002, each referendum created pursuant to procedures required at N.J.S.A. 40:12-15.1 *et seq*. All three referenda were approved. Voter approval is an initial procedural component required, N.J.A.C. 7:36-5.1(b)(5).

2. In November 1998 two other—i.e., two additional—ballot questions were on the general election ballot. Each question addressed land preservation issues. The first was a referendum, also pursuant to N.J.S.A. 40:12-15.1 *et seq*., by Burlington County, where the Township is located. The County referendum appeared on every ballot within the County's 40 municipalities. The second was a ballot question on every ballot in New Jersey. If passed, the vote created an amendment to the New Jersey Constitution for a more permanent funding source for land preservation. All the November 1998 ballot questions (Township, County and State) were passed by Township voters. Within Burlington County, the County referendum passed. Statewide, the amendment to the State Constitution was approved. Thereafter, the State adopted N.J.S.A. 13:8C-1 *et seq*. The public policy section at N.J.S.A. 13:8C-2 is quoted at length, supra.

3. The Township retained a consulting firm to assist in the creation of a proper and "comprehensive" plan pursuant to State law. The plan's completion and adequacy is a required component of a municipality's application for admission to New Jersey's Green Acre Program.

4. The Township created its Open Space Recreation Plan (OSRP), the planning document defined at N.J.A.C. 7:36-2.1:

> "Open Space and Recreation Plan" means the plan developed by a local unit that identifies *existing*

> *and potential* open space preservation and recreation opportunities in a municipality, county, or region *and* that is *reviewed and approved* by Green Acres for purposes of qualifying a project under the grant incentive project category described at N.J.A.C. 7:36-5.1(b)5.

Emphasis added.

5. Public hearings were held on the Township's OSRP per State requirements and adjustments made to the OSRP as a consequence of those public hearings.

6. The Township applied for admission into the New Jersey Department of Environmental Protection's Planning Incentive Grant Program, a portion of the State's Green Acre programs.

7. The Township was admitted into the program, becoming eligible for State funding to assist with the cost of open space acquisition/preservation.

8. The Township was awarded (by Green Acres of the State of New Jersey) Four Hundred Thousand ($400,000.00) Dollars *toward the acquisition of this very property*. For any municipality to receive funding from the State, the parcel acquired, including this one, must have been on the OSRP, the subject of a comprehensive inspection at which the property owner was, in this case, present, two appraisals prepared pursuant to Green Acre requirements, inspections, environmental assessments, freshwater wetland analysis, etc. The proofs presented below were detailed, demonstrating Township compliance with requirements.

Petitioners apparently argue that because the OSRP here, for open space preservation in New Jersey, is a qualitatively different type of plan than the one required by Connecticut for redevelopment, that somehow the Township's open space plan (OSRP) here is not a comprehensive plan.

Petitioners also request the Court to make a detailed re-determination of facts upon which the Petition itself relies, i.e., the existence of "ad hoc," "pretextural" and "bad faith" actions. The argument, from the Question Presented on the Petition's first page and thereafter, is focused upon these words: "ad hoc," "pretextural" and "bad faith." The argument was made below, compared to the facts in the record, and rejected. It is not a proper issue before the Court.

### C. *Kelo v. New London*

The Court determined in *Kelo*, supra, that the City of New London, in pursuing a plan that served a public purpose, satisfied the Fifth Amendment. Here, it is no different. The Township has followed State law and, by doing so, has met the Court's "public purpose" test. In *Kelo*, New London was following Connecticut's statutory scheme. Justice Stevens recited that the Connecticut statute "expresses a legislative determination that the taking of land, even developed land, as part of an economic development project is a 'public use' and in the 'public interest,'" *Kelo* at 476. The Supreme Court of New Jersey has done the same here.

The issues in *Kelo* and the issues here are meaningfully different. The issue here is whether a densely populated State may take action to preserve open space, agricultural land, etc. Land acquired pursuant to New Jersey's preservation statutes (and the land acquired here) is owned and maintained perpetually *by the public entity* preserving the land. In *Kelo*, the Court was

grappling with issues of publicly acquired land provided to a third, private party to enable the land's economic redevelopment. New Jersey also has a line of cases addressing private beneficiaries of eminent domain. However, those issues are not here. The Township will own, maintain and preserve the property acquired perpetually, thereby fulfilling the policy considerations set forth at N.J.S.A. 13:8C-2, *supra*. New Jersey has clearly made its legislative determination. It deserves deference.

**D. *Southern Burlington County NAACP v. Township of Mount Laurel*, 456 A.2d 390 (N.J. 1983).**

Petitioners ask the United States Supreme Court to note that 24 years ago the Township violated public policy in this landmark New Jersey case. The issue so presented by Petitioners is entirely irrelevant to the matter before the Court. Nevertheless, the Township does not want an absence of comment to be misconstrued.

Therefore, the Court is respectfully informed that the Township has been in full compliance with all New Jersey affordable housing requirements since 1985. The courts of New Jersey control the Township's compliance with the 1983 *Mount Laurel* decision, supra, (and the very substantial statutes and regulations the decision generated). Over the last twenty-one years, these courts have repeatedly determined Mount Laurel Township to be in full compliance with all requirements.

Petitioners' utilization of this old decision is unfortunate. It is presumably articulated to bring a reader to a conclusion unrelated to the merits of the Petition, i.e., that the Township is somehow institutionally unprepared to comply with legal requirements. Such an approach appears argumentative and obviously inconsistent with the Court's requirement for a concise presentation.

## CONCLUSION

For the reasons set forth, it is respectfully submitted that the Petition for a Writ of Certiorari be denied.

Respectfully submitted,

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No. 06-1345

FILED
JUN 19 2007
OFFICE OF THE CLERK
SUPREME COURT, U.S.

# In the Supreme Court of the United States

MIPRO HOMES, L.L.C., AND BUILDERS LEAGUE OF SOUTH JERSEY, INC.,

*Petitioners*,

v.

MOUNT LAUREL TOWNSHIP,

*Respondent.*

**On Petition for a Writ of Certiorari to the Supreme Court of New Jersey**

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Our petition presents a pressing question left unresolved in *Kelo*—whether a municipality must engage in "comprehensive" and "deliberat[e]" planning in order to receive the "great respect" that is owed to local government "in discerning local public needs." 545 U.S. at 482, 484; *id.* at 493 (Kennedy, J., concurring). Mount Laurel's actions in taking MiPro's property without planning, and the trial court's finding that the Township acted with a pretextual motive, make this the perfect example of the "hypothetical" case referred to by the *Kelo* majority, where the "unusual exercise of government power" raises "suspicion" of improper purpose. *Id.* at 487 & n.17. It is the "sort of cas[e]" described by Justice Kennedy, where the "procedures employed" are "so prone to abuse" that the taking does not pass constitutional muster. *Kelo*, 545 U.S. at 493.

Although the proper "circumstances" were not "present" in *Kelo* to elaborate on the procedural requirements of the Fifth Amendment (545 U.S. at 493 (Kennedy, J., concurring)), they *are* present here. This case presents the "paradigmatic illustration of the absence of planning." NAHB Am. Br. 8. The Supreme Court of New Jersey gave Mount Laurel a green light to condemn MiPro's property for open space without plans or studies documenting a need for the land, without particular standards to determine whether acquisition was proper, without consulting its Planning Board, and with a pretextual rationale for the taking. This case provides the Court an opportunity to address the limits of the deference due local decisions to take private property—an issue as to which courts are deeply divided—and to reaffirm the necessity of "elaborate procedural requirements that facilitate review of the record and inquiry into the

city's purposes." *Kelo*, 545 U.S. at 493 (Kennedy, J., concurring).

The importance of acting now to clarify that the decision of the Supreme Court of New Jersey is inconsistent with *Kelo* and the Fifth Amendment can hardly be overstated. The number of municipal takings of private property has skyrocketed after *Kelo*; from June 2005 to June 2006 alone, more than 5,700 actual or threatened economic development takings occurred. AFBF Am. Br. 4-5; see DANA BERLINER, OPENING THE FLOODGATES: EMINENT DOMAIN ABUSE IN THE POST-*KELO* WORLD (June 2006), available at http://www.castlecoalition.org/publications/floodgates/index.html. Briefs of *amici curiae* representing builders, farmers, and real estate managers and owners attest to the critical importance of defining the judiciary's responsibility to check otherwise untethered eminent domain power. Lower courts must be provided "guidance as to the location of the nether end of the public use spectrum—i.e., the point at which broad deference to local decisions ends and the 'skeptical eye' comes into play." NAHB Am. Br. 7.

Mount Laurel's perfunctory opposition does not address the compelling reasons to grant certiorari set forth in the petition and *amicus* briefs. To the contrary, the Township makes significant factual concessions that show this case is appropriate for the Court's review. The Township does not dispute that its real goal in acquiring MiPro's property was to "[s]ave" the land "[f]rom [d]evelopment" and "reduc[e] the number of residential units in the Township" (Pet. 4; Pet. App. 31a-32a); that Township officials did not consult with the Planning Board to determine, before condemning MiPro's property, whether acquisition was consistent with its open

space goals (Pet. 4-5; Pet. App. 43a-44a); that no studies were done to document the Township's need for additional space or the suitability of MiPro's land to meet open space goals (Pet. 5-6; Pet. App. 32a); or that the Master Plan was amended only after the initiation of this litigation, and then only to make blanket provision that "all potential parcels" in the Township not yet developed were "locationally suitable for permanent open space" (Pet. 5; Pet. App. 14a). See S. Ct. Rule 15.2 (respondent has obligation to correct in its opposition any perceived factual misstatements in the petition).

The Township also makes significant concessions as to the controlling legal principles. It does not refute the importance of a "carefully formulated" "integrated development plan" to the Court's analysis in *Kelo*. 545 U.S. at 473-474 & n.2, 483; *id.* at 493 (Kennedy, J., concurring); *id.* at 502, 504 (O'Connor J., dissenting). It does not dispute that this Court has repeatedly found the Fifth Amendment to require a procedurally sound public use determination. *Berman* v. *Parker*, 348 U.S. 26, 29, 34-35 (1954); *Hawaii Housing Auth.* v. *Midkiff*, 467 U.S. 229, 232-234, 242 (1984). It does not seriously challenge the necessity of procedural limits to the exercise of eminent domain following *Kelo*. Most notably, it does not deny that courts are splintered in their interpretation of the procedural requirements that govern the taking of land—a split that we showed extends to at least four federal circuits and seven states.

As a result, Mount Laurel is left with few arguments against certiorari, none of them persuasive. It asserts that petitioners have waived any Fifth Amendment argument; claims that petitioners are urging the Court to engage in fact finding; pretends that the issue presented is

whether a State may preserve open space; and contends that the constitution permits government to take private property in an *ad hoc* manner. Each of these arguments is easily refuted.

## I. Petitioners Have Not Waived Their Fifth Amendment Argument.

Without referencing the record, discussing the proceeding below in any substantive manner, or addressing New Jersey waiver law, the Township asserts that MiPro's Fifth Amendment argument "has not previously been asserted or argued in any pleadings or subsequent briefs filed in any New Jersey court." Opp. 1. In fact, MiPro explicitly argued in the Supreme Court of New Jersey that the Township's *ad hoc* and pretextual taking of its property violated the Fifth Amendment's procedural guarantees. Citing *Kelo*, MiPro argued that the Appellate Division "ignore[d] the constitutional requirements of the Fifth Amendment of the United States Constitution." Pet. for Certification, N.J. Sup. Ct., at 5. Developing its constitutional argument, MiPro contended, citing *Kelo*, that a condemnation must be "fully planned" to satisfy the "Fifth Amendment," but that "no proof of any planning by the Township exists." *Id.* at 15-16. The National Association of Home Builders, participating as *amicus curiae* in the state supreme court, further elaborated this argument. It submitted that, under *Kelo*, the "lack of adequate, comprehensive planning" deprived the Township's actions of "a rational basis" and made clear that "the Township [was] wielding the sovereign's power not for a proper public purpose or a proper public use." NAHB Am. Br., N.J. Sup.Ct., at 2-6.

MiPro's raising of the federal issue in the Supreme Court of New Jersey preserves it for this Court's review.

The Township was afforded an opportunity to address the federal question on its merits, as required by New Jersey law. *Walker Rogge, Inc.* v. *Chelsea Title & Guar. Co.*, 603 A.2d 557, 560 (N.J. Super. App. Div. 1992) (issue was not waived where opposing party had opportunity to respond "on [the] merits"); see also *Webb* v. *Webb*, 451 U.S. 493, 500 (1981) (waiver doctrine requires that parties had a fair opportunity to address the federal question). Instead of arguing to the state Supreme Court that petitioners had waived the federal issue (*Walker Rogge,* 603 A.2d at 560), the Township submitted that *Kelo* does not require comprehensive planning in all cases, misreading this Court's opinion as merely requiring compliance with state land use statutes. Mount Laurel Opp. to NAHB Am. Br. at 7-10. The Township also maintained that it had engaged in the extensive planning required by *Kelo*. *Id.* at 11-13; see also State of New Jersey Am. Br. at 8-9 (arguing that *Kelo* permits municipal condemnation of property in furtherance of the public purpose of preventing development).

That the Supreme Court of New Jersey chose not to address petitioners' Fifth Amendment argument, despite briefing on the subject by both parties and *amici*, is not determinative of the waiver issue. See *Webb*, 451 U.S. at 501 (where state court was "apprised of the nature or substance of the federal claim," the issue is preserved even if it is not "addressed" by that court); *Beck* v. *Alabama*, 447 U.S. 625, 630 n.6 (1980) (state supreme court's "failure to address petitioner's federal constitutional claims" cannot be construed "as a determination that petitioner had waived those claims" where "[i]t is clear that petitioner did present his federal claims in some fashion" to that court). Where an issue has been

briefed it is preserved for review. See *Walker Rogge*, 603 A.2d at 560; *Liebling* v. *Garden State Indem.*, 767 A.2d 515, 525 (N.J. Super. App. Div. 2001).

To the extent that Mount Laurel suggests that the federal issue also should have been raised in the Appellate Division or state trial court, that argument is unavailing. This Court decided *Kelo* only after briefing had been completed and oral argument held in the Appellate Division. In similar circumstances, this Court has found a grant of certiorari to be proper. *Middlesex County Sewerage Auth.* v. *Nat'l Sea Clammers Ass'n*, 453 U.S. 1, 19 (1981) (addressing *Maine* v. *Thiboutot*'s applicability to the facts of the case, "despite the failure of respondents to raise it here or below," because "[t]his litigation began long before that decision"); *Rosenblatt* v. *Baer*, 383 U.S. 75, 77 (1966) (granting certiorari to decide whether respondent was a "public official" under *Garrison* v. *Louisiana*, 379 U.S. 64 (1964), despite parties' failure to raise the issue in state court); *Brinkerhoff-Faris Trust & Sav. Co.* v. *Hill*, 281 U.S. 673, 678 (1930); see also *Standard Indus., Inc.* v. *Tigrett Indus., Inc.*, 397 U.S. 586, 587 (1970) (Black, J., dissenting from per curiam opinion) (the Court "ha[s] frequently allowed parties to raise issues for the first time on appeal when there has been a significant change in the law" (citing cases)).

Furthermore, the Appellate Division acknowledged *Kelo*—decided after briefing and argument but before the Appellate Division's opinion issued—and attempted to apply it to the facts of this case. Pet. App. 23a (misciting *Kelo* for the proposition that acquiring land for the "public purpose" of conserving open space is a legitimate "public use," even if the Township had an ulterior motive in condemning the property). The Appellate Di-

vision's effort to address *Kelo*'s implications for this case makes that issue especially appropriate for review. See *Weeden* v. *City Council of City of Trenton*, 917 A.2d 815, 821 n.3 (N.J. Super. App. Div. 2007) (where an issue is "fairly presented" in a judicial opinion, it may form the basis of a valid appeal); *Orr* v. *Orr*, 440 U.S. 268, 274-275 (1979) (where state court decided the federal issue, objection that it was not preserved was "'untenable'").[1]

In fact, even if petitioners had waived their Fifth Amendment objection to the *ad hoc* and pretextual taking of MiPro's property by the Township—which they did not—it would still be proper for this Court to grant certiorari to decide the recurring question of what constitutional protections are due a private party under these circumstances. New Jersey recognizes an exception to general waiver principles where the "questions so raised on appeal * * * concern matters of great public interest." *Nieder* v. *Royal Indem. Ins. Co.*, 300 A.2d 142,

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[1] Further, MiPro fully briefed the substance of its federal constitutional argument in the lower state courts. See *Nelson* v. *Adams USA, Inc.*, 529 U.S. 460, 469 (2000) (waiver principles require only "that the lower court be fairly put on notice as to the substance of the issue"). It argued that a municipality may not take land for a pretextual purpose, but must act in conformance with minimum procedural guarantees, including a comprehensive planning process. See MiPro Br., App. Div. at 13 ("the Township has been unable to demonstrate that it undertook careful steps to determine its open space needs, devised a plan to fulfill those needs and identify a particular property as necessary for open space or recreation in an under-served area of the Township"); *id.* at 44 ("The State advocates utilization of a local and regional assessment of open space needs, but clearly that was not done by Mount Laurel"); Mount Laurel Reply, App. Div. at 12 (claiming that Township did act pursuant to a comprehensive planning process).

145 (N.J. 1973). The questions raised by this case are certainly of that caliber. The decision of the Supreme Court of New Jersey has great practical importance across the country, particularly in light of the increased and increasingly-questionable use of condemnation after *Kelo*. BERLINER, *supra*; DAVID DANA & THOMAS MERRILL, PROPERTY: TAKINGS 207 (2002). Left uncorrected, the decision below undermines the Fifth Amendment's guarantee of a procedurally-sound public use determination, only a year after members of both the majority and the dissent in *Kelo* emphasized the dispositive role the constitution plays in "impos[ing] * * * meaningful judicial limits on the government's power to condemn any property it likes." *Kelo*, 545 U.S. at 492 (Kennedy, J., concurring); *id.* at 473-474; *id.* at 502, 504 (O'Connor, J., dissenting). If the public use requirement of the Takings Clause is to retain any meaning after *Kelo* this Court must address petitioners' constitutional argument on its merits.

## II. Mount Laurel's Other Arguments Against Certiorari Are Meritless.

1. The Township misstates the issue presented as "whether a densely populated State may take action to preserve open space." Opp. 9. But petitioners do not dispute that a municipality may "take action to preserve open space," or condemn land for any other public use, provided that it complies with constitutional requirements. *Id.* at 9-10. In particular, the condemnation "must be preceded by careful municipal study of the kind discussed in *Kelo*," which was "concededly absent here." NAHB Am. Br. 10. Mount Laurel does not even pretend to have engaged in that sort of planning here.

2. The Township asserts that petitioners improperly ask this Court to "make a detailed redetermination of facts." Opp. 9. But the trial court, on the basis of "overwhelming" evidence, made the factual determinations in this case—findings that Mount Laurel says nothing about in its opposition. The trial court found that the Township had "no study or report" that indicated a need for additional open space, made no determination regarding the suitability of the MiPro parcel for acquisition as open space, and proffered an "open space" rationale for the taking that was pretextual, disguising an ulterior purpose of thwarting residential development. Pet. App. 43a-46a. Without disturbing these factual findings, the Appellate Division and Supreme Court held that the lack of planning did not preclude exercise of the Township's power of eminent domain. It is this *legal* determination—and the assumption that the "public use" condition does not operate as a meaningful limit on the takings power—that MiPro asks this Court to review.

3. The Township contends it had a "comprehensive plan" based on New Jersey preservation statutes. Opp. 6-9. It does *not* argue that it had a "carefully formulated" "integrated development plan" anything like that praised in *Kelo*. 545 U.S. at 473-474 & n.2, 483. Admission to the New Jersey Green Acres Program merely requires a municipality to create an Open Space Recreation Plan (OSRP) and allow the public to attend meetings concerning the OSRP. Opp. 7-8. The relevant statutes do not, however, require a good faith planning process, complete with public hearings, supporting studies, and the lack of a pretextual motive—the "foundation[s] of a constitutionally sufficient exercise of eminent domain." AvalonBay Am. Br. 7. Indeed, the Township concedes

that it did not conduct studies of its need for MiPro's property and that its decision to include MiPro's property on the OSRP was made in reaction to litigation in this case. The Township instead argues that simply because it "followed State law" (Opp. 9), its *ad hoc*, pretextual taking should be regarded as constitutional.

That reasoning would impose no constraints on the procedural requirements adopted by a State. It reflects an extraordinarily broad interpretation of municipal authority at odds with this Court's modern precedents. It runs afoul of the Court's opinion in *Kelo,* which emphasized the "need for honest municipal planning." NAHB Am. Br. 10. And far from providing a reason to uphold the decision of the Supreme Court of New Jersey, the Township's reasoning demonstrates the importance of granting review. "If eminent domain may be utilized without a plan, and notwithstanding pretext," then "there is no telling where that [would] take us." AvalonBay Am. Br. 10-11 (quoting G. Kanner, *What Does It Take to Recognize Bad Faith*, JUST COMPENSATION, Dec. 2006, at 12). In the absence of substantive limits on the meaning of "public use," "basic standards of procedural fairness," guaranteed by the Fifth Amendment, are the "only protection * * * left against unwarranted or ill-advised takings." AFBF Am. Br. 3. The Township, like the Supreme Court of New Jersey, "cavalierly swe[eps] aside" these important safeguards (*id.* at 12) and makes necessary this Court's immediate intervention.

## CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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JUNE 2007

MOTION FILED
JUN 0 8 2007

(3)

No. 06-1345

IN THE

# Supreme Court of the United States

MIPRO HOMES, L.L.C., AND BUILDERS LEAGUE OF SOUTH NEW JERSEY, INC.,

*Petitioners,*

v.

MOUNT LAUREL TOWNSHIP,

*Respondent.*

**On Petition for a Writ of Certiorari to the Supreme Court of New Jersey**

## MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE AND BRIEF AMICUS CURIAE OF THE AMERICAN FARM BUREAU FEDERATION IN SUPPORT OF PETITIONERS

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**On Petition for a Writ of Certiorari to the Supreme Court of New Jersey**

## MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE IN SUPPORT OF PETITIONERS

Pursuant to S. Ct. R. 37.2(b), the American Farm Bureau Federation ("AFBF") hereby moves to file the attached brief amicus curiae in support of petitioners in the above-captioned matter. Petitioners MiPro Homes, L.L.C. and Builders League of South New Jersey, Inc. have consented to the filing of AFBF's brief; a copy of their consent letter has been filed with the Clerk. Respondent Mount Laurel Township has refused to consent to the filing of AFBF's brief, thus requiring AFBF to file this motion.

AFBF is a voluntary general farm organization formed in 1919 under the General Not-For-Profit Corporation Act of the State of Illinois. AFBF was founded to protect, promote, and represent the business, economic, social, and educational interests of American farmers and ranchers. It has member organizations in all 50 states and Puerto Rico, representing more than 6.2 million member families.

AFBF and its members have a direct and substantial interest in this case. Since this Court's decision in *Kelo* v. *City of New London*, 545 U.S. 469 (2005), the number of so-called "economic development" takings has been on the rise. America's farmers—who own vast tracts of open land—are attractive targets for municipalities and other government entities seeking such land for "economic development" and other similar purposes. As a consequence, unfortunately, America's farmers are thus also at particular risk of becoming victims of eminent domain abuse.

In *Kelo*, this Court made clear that the Takings Clause embodies at least minimum procedural protections that ensure that eminent domain decisions are "considered" and worthy of judicial deference. *Id.* at 483. In upholding a taking that was blatantly *ad hoc* and pretextual, the Supreme Court of New Jersey below cavalierly swept away virtually the only protection that farmers have left against unwarranted or ill-advised takings: the protection offered by a comprehensive planning process in which the government's *actual* reason for a taking is subjected to public scrutiny and debate. If left to stand, the decision below will embolden government entities to seize private property without engaging in any sort of meaningful deliberative process, thereby subjecting farmers to even greater risk of eminent domain abuse.

Accordingly, AFBF respectfully requests that its motion for leave to file a brief amicus curiae in support of petitioners be granted.

Respectfully submitted,

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*Respondent.*

**On Petition for a Writ of Certiorari to the Supreme Court of New Jersey**

## BRIEF AMICUS CURIAE OF THE AMERICAN FARM BUREAU FEDERATION IN SUPPORT OF PETITIONERS

## STATEMENT OF INTEREST OF AMICUS CURIAE

Amicus curiae the American Farm Bureau Federation ("AFBF") is a voluntary general farm organization formed in 1919 under the General Not-For-Profit Corporation Act of the State of Illinois.[1] AFBF was founded to protect, promote,

[1] Pursuant to this Court's Rule 37.6, AFBF notes that no part of this brief was authored by counsel for any party, and no person or entity other than AFBF or its members made a monetary contribution to the preparation or submission of the brief.

and represent the business, economic, social, and educational interests of American farmers and ranchers. It has member organizations in all 50 states and Puerto Rico, representing more than 6.2 million member families.

As explained further below, America's farmers are attractive targets for government officials seeking land for "economic development" and other similar purposes, and are thus also particularly vulnerable to eminent domain abuses. Accordingly, AFBF and its members are directly affected by the decision of the Supreme Court of New Jersey below, which gives *carte blanche* to government officials to take land on a pretextual basis and without subjecting the eminent domain decision to a comprehensive planning process.

AFBF, often together with one or more of its member state Farm Bureaus, has filed briefs amicus curiae before this Court in numerous takings cases over the past two decades, including *Kelo* v. *City of New London*, 545 U.S. 469 (2005); *Palazzolo* v. *Rhode Island*, 533 U.S. 606 (2001); *Dolan* v. *City of Tigard*, 512 U.S. 374 (1994); and *Lucas* v. *South Carolina Coastal Council*, 505 U.S. 1003 (1992). Because of AFBF's acute and ongoing concern with eminent domain abuse, and because AFBF and its members closely monitor eminent domain litigation and legislation throughout the country, AFBF is uniquely situated to bring to the Court's attention the troubling implications of the decision below.

## SUMMARY OF ARGUMENT

Since this Court's decision in *Kelo*, the number of so-called "economic development" takings has risen dramatically. America's farmers—who own vast tracts of open land—have become attractive targets for government entities seeking land for "economic development" and other similar purposes, and are thus at increased risk of becoming victims of eminent domain abuse. In *Kelo*, this Court held that "empirical debates over the wisdom of takings—no less than debates over the wisdom of other kinds of socioeconomic legislation—are not to be carried out in the federal courts." 545 U.S. at 488 (quotation omitted). But *Kelo*'s directive that courts steer clear of public policy debates does not mean that courts have no role to play in enforcing constitutional checks on the government's exercise of the Takings Clause. To the contrary, *Kelo* itself makes clear that the Constitution places procedural limitations on the government's exercise of eminent domain that ensure that the government's decision to take private property is truly "considered" and made pursuant to a comprehensive planning process. *Id.* at 478.

The Supreme Court of New Jersey ignored this aspect of *Kelo* in upholding a taking that was, for reasons thoroughly recounted by petitioners, both *ad hoc* and pretextual. *See* Pet. 2-7, 21-23. That makes its decision troubling in two important respects. Not only does it flout *Kelo*, but it strips farmers of virtually the only protection they have left against unwarranted or ill-advised takings: the protection provided by public scrutiny and open debate. If courts are to defer to political determinations of what is an appropriate "public use," it is critical that they at least ensure that such political determinations are the result of a planning process that satisfies, at a minimum, basic standards of procedural fairness.

## ARGUMENT

### I. AMERICA'S FARMERS ARE PARTICULARLY VULNERABLE TO EMINENT DOMAIN ABUSES.

For American farmers, "land ownership and private property rights associated with land ownership [are] sacred. * * * [F]armland is their principal asset[,] their ability to capitalize their business by using the land as collateral for loans, their life savings, and their pension * * *." *See* Testimony of Bob Nolan, President-Elect, Long Island Farm Bureau, before the New York Senate Committee on Commerce, Economic Development and Small Business (Oct. 19, 2005).[2] Farmers are particularly loathe to give up their land to eminent domain, because in their estimation the value of their land far exceeds its "fair market value." *See Coniston Corp.* v. *Village of Hoffman Estates*, 844 F.2d 461, 464 (7th Cir. 1988) (Posner, J.) (noting that "because of relocation costs, sentimental attachments, or the special suitability of the property for their particular * * * needs," certain categories of owners "value their property at more than its market value").[3] It is an unfortunate irony, then, that farmers—the class of landowners with perhaps the deepest connection to the land they own—are also at particular risk of having that land swept out from under them by aggressive and abusive eminent domain practices.

1. In recent years, the number of takings of private property for economic development has skyrocketed. Between

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[2] *Available at* http://209.85.165.104/search?q=cache:9cJgMVYg-PoJ:www.lifb.com/fileadmin/Policy_Information/emiment_domaine_test_05.doc+kelo+farms&hl=en&ct=clnk&cd=1&gl=us.

[3] That assumes that farmers will be offered fair market value for their land in the first place, which often is not the case. *See generally* Abraham Bell & Gideon Parchomovsky, *Taking Compensation Private*, 59 Stan. L. Rev. 871 (2007) (collecting cases and studies suggesting that localities usually offer potential condemnees far less than the fair market value of their property).

1998 and 2002 alone, more than 10,000 condemnations for economic development purposes were either threatened or filed. *See* Dana Berliner, Institute for Justice, *Public Power, Private Gain* 2 (2003).[4] That translates into a rate of more than 2,000 actual or threatened "economic development" takings per year. Post-*Kelo*, those numbers have jumped exponentially: In the one-year period beginning in June 2005, more than 5,700 actual or threatened economic development takings occurred. *See* Dana Berliner, Institute for Justice, *Opening the Floodgates: Eminent Domain Abuse in the Post-*Kelo *World* 1 (2006).[5]

America's farmers are among the chief victims of this eminent domain juggernaut. Reports documenting the use of eminent domain note that farmers have been targeted for years and that, post-*Kelo*, "agricultural land has been taken for still more retail development." *See id.* at 3. *See also* Government Accounting Office, *Eminent Domain: Information About Its Uses and Effect on Property Owners and Communities Is Limited*, GAO-07-28, at 34 (Nov. 2006) (noting that, according to farming organizations, "farmland may be wrongly designated as blighted" and condemned on that basis even when its buildings are "fully functional or operable").[6] Legislators similarly have recognized that farmers are at particular risk of having their land seized. *See, e.g.*, Statement of Rep. John McHugh (Nov. 3, 2005) (noting that *Kelo* and the practices it approved have "made many property owners vulnerable, particularly our upstate farmers").[7] And because they are such attractive targets for the exercise of eminent domain, farmers are particularly vulnerable to eminent domain abuses.

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[4] *Available at* http://www.castlecoalition.org/pdf/report/ED_report.pdf.

[5] *Available at* http://www.castlecoalition.org/pdf/publications/floodgates/intro.html.

[6] *Available at* http://www.gao.gov/new.items/d0728.pdf.

[7] *Available at* http://mchugh.house.gov/pr2005/110305_eminentdomain.html.

There are several reasons why government officials are targeting farmers' land. To begin with, farms tend to generate less tax revenue per acre than would be generated by a shopping mall, office complex, or residential subdivision on the same property. *See* Testimony of Bob Nolan, *supra.* Farmland also typically is flat and open—as opposed to forested or blighted—which makes it especially attractive to developers looking to minimize their land-preparation costs. *Id.* And because farmers tend to own large parcels of land, targeting a farm allows local governments to seize the land they need while minimizing bureaucratic hassles and headaches; if a municipality needs 30 acres of land to build a shopping center, it is much easier to wage a political and legal battle against one farming family rather than dozens or hundreds of residents of a subdivision.

2. Some states have begun to take steps to protect farmers by declaring their land off-limits to eminent domain except in certain circumstances. *See, e.g.*, Patricia E. Salkin, *Eminent Domain Legislation Post-*Kelo*: A State of the States*, 36 Envtl. L. Rep. 10864, 10869 (Nov. 2006) (noting that states including Idaho, Tennessee, Nebraska, and Missouri have revised their laws to ensure, among other things, that agricultural land cannot be deemed "blighted" and condemned on that basis). But despite these steps in the right direction, farmers continue to lose their land to questionable eminent domain practices.

In Troy, Illinois, for example, the city council recently condemned 175 acres of farmland for a shopping center anchored by a Lowe's Home Improvement store and other national chains. *See Opening the Floodgates* at 40 (citing Jennifer Kapiolani Saxton, *Troy May Force Sale Of Land For Retail Development*, Belleville News-Democrat (Oct. 5, 2005)). In Coatesville, Pennsylvania, the city notified farmer Dick Saha in 1999 that it intended to condemn his 48-acre farm to build a municipal golf course as part of a proposed $60 million recreation center featuring go-karts and batting cages. *See* Monica Yant Kinney, *Fighting to Keep Their*

*Farm Intact*, Philadelphia Inquirer (June 4, 2002).[8] The city's initial condemnation approval touched off a six-year battle that featured three amendments to the city charter aimed at preventing the taking. *See* http://www.saveourfarm.com. In May 2005, the Sahas and the city finally reached a settlement permitting the Sahas to keep most of their farm. But it was a Pyrrhic victory: The Sahas incurred over $300,000 in legal bills, thus exhausting most of their retirement savings in defending their property. *Id.*

The Davidson family of Armona, California was less fortunate. The Davidsons learned last year that the local Community Services District planned to take their 20-acre farm—which had been their home for four generations—and cover it with evaporation ponds. Local officials voted to reconsider after "an uproar from the Davidson family and sympathetic comments from much of the audience." *See* Seth Nidever, *Severing Family Roots: Family Plans To Battle Armona Community Services District To Keep 4-Generation Land*, Hanford Sentinel (Dec. 18, 2006). But the Davidsons eventually lost their fight; on March 21, 2007, the Community Services District voted to take the Davidsons' property. *See* http://armonafarm.com/index.html.

In Piscataway, New Jersey, the Halper family lost its 75-acre farm after battling the city for six years. *See, e.g.*, Diane Walsh, *Appeals Court Awards Halper Acreage to Piscataway*, The Star-Ledger (Mar. 23, 2004). During the long fight, the township cited a string of unrelated uses for the property, including open space, a park, and private development. *Id. See also Piscataway Proceeds With Condemnation Of Farm*, SierraActivist.org (Apr. 2, 2004). To add insult to injury, the township accused the Halpers of refusing to cooperate with town officials in helping them find a new home. But as the Halpers explained, "relocation specialists" had attempted to "assist" them by sending them a list of small homes and apartments to which they could move. *See* Matt Labash, *This Land Is Whose Land?*, The Weekly

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[8] *Available at* www.freerepublic.com/focus/news/694382/posts.

Standard (Sept. 11, 2006.) As family patriarch Larry Halper put it: "I don't have an apartment. I have a farm." *Id.*

## II. THE DECISION BELOW STRIPS FARMERS OF VIRTUALLY THE ONLY PROTECTION THEY HAVE LEFT AGAINST EMINENT DOMAIN ABUSES.

In *Kelo*, this Court held that the government has "broad latitude in determining what public needs justify the use of the takings power." 545 U.S. at 483. At the same time, however, the Court made clear that the Takings Clause embodies at least minimum procedural protections to ensure that eminent domain decisions are indeed "considered" and thus worthy of such deference. *Id.* Those important procedural safeguards are virtually all that farmers have left to protect themselves from unwarranted takings. In upholding a taking that was blatantly *ad hoc* and pretextual, *see* Pet. 2-7, 21-23, the decision below not only flouts this Court's decision in *Kelo*, but puts farmers at increased risk of eminent domain abuse. This Court should grant review to reaffirm that *Kelo* did not give government entities *carte blanche* to seize private property without subjecting the "true" reason for a taking to comprehensive public review.

1. As petitioners note, *see* Pet. 13, the Court's decision in *Kelo* is replete with references to the comprehensive nature of New London's development plan and the deliberations that had gone into that plan's genesis. Indeed, *Kelo* begins with a detailed recounting of the intricate steps local planners took to bring their plan to fruition: the New London Development Company ("NLDC") was reactivated; the state issued a bond to support the NLDC's planning activities; the NLDC sought and received "initial approval from the city council" and "held a series of neighborhood meetings to educate the public about the process"; the NLDC received yet another city council authorization; and, finally, the NLDC obtained state-level approval. 545 U.S. at 473. That state-level approval was itself a full-blown process, involving "[v]arious state agencies" that "studied the project's economic, environmental, and social ramifications," as well as

"a team of consultants" that "evaluated six alternative development proposals." *Id.* at 473 n.2.

The *Kelo* Court went on to intimate that it was precisely because of this comprehensive, deliberative planning that the city's public use determination was "entitled to * * * deference." *Id.* at 483. In holding that deference was appropriate, the majority observed that New London had "carefully formulated an economic development plan," that it was "endeavoring to coordinate a variety of commercial, residential, and recreational uses of land," that the plan was "comprehensive," and that "thorough deliberation * * * preceded its adoption." *Id.* at 483-484. Justice Kennedy, who provided the deciding vote, picked up this thread in his concurrence. He wrote that while there may be cases in which a departure from rational basis review is warranted, *Kelo* was not such a case because the New London taking "occurred in the context of a comprehensive development plan," and the city "complied with elaborate procedural requirements that facilitate review of the record and inquiry into the city's purposes." *Id.* at 493 (Kennedy, J., concurring).

2. In short, it is impossible to ignore the fact that "the word 'plan,' 'planning,' or 'planner' appears over 40 times in the majority opinion" in *Kelo*. John D. Echeverria, Lingle, *Etc.: The U.S. Supreme Court's 2005 Takings Trilogy*, 35 Envtl. L. Rep. 10,577, 10,586 (Sept. 2005). Thus, far from abandoning the field in all but those rare cases where the proverbial "stupid staffer" admits malfeasance, *Kelo*, 545 U.S. at 502 (O'Connor, J., dissenting) (quotation and alteration omitted), *Kelo* underscores an "important * * * limitation" on the eminent domain power—"that the courts should uphold, or at least pay deference to, government exercises of eminent domain only when the authority is used to implement a comprehensive plan for an entire area developed with intensive public involvement and approved by responsible elected officials." Echeverria, 35 Envtl. L. Rep. at 10,586.

*Kelo*, in other words, emphasizes that courts are well-suited to check the takings power, while still avoiding policy imbroglios, by simply ensuring that the locality has run its

plan through the wringer of the democratic process. *See* Clayton Gillette, *Kelo and the Local Political Process*, 34 Hofstra L. Rev. 13, 18 (2005) (arguing that *Kelo* contemplates "a process that involves significant engagement by multiple actors in public hearings concerning what should be constructed where and by whom"). Where such a process is absent—where the eminent domain decision is *ad hoc* or pretextual—the courts should presume that the taking fails to satisfy the public use requirement. *See Kelo*, 545 U.S. at 493 (Kennedy, J., concurring) (noting that "there may be categories of cases in which * * * the procedures employed [are] so prone to abuse * * * that courts should presume an impermissible private purpose").

Indeed, the highest court of at least one state has read *Kelo* in just this way. In *Mayor & City Council of Baltimore City* v. *Valsamaki*, 916 A.2d 324 (Md. 2007), the Maryland Court of Appeals rejected the argument that the City of Baltimore could take private property based on a simple recitation that the land would be used for "business expansion." *Id.* at 348-351.[9] The court noted that the city had no detailed plan for what precisely would happen to the condemned land, and deemed *Kelo* incompatible with a finding that "public use" had been established in such circumstances. *Id.* at 352 (noting that the taking in *Kelo* was "conducted pursuant to [a] comprehensive development plan[] * * * in place prior to the taking").[10]

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[9] The *Valsamaki* court was dealing with a "quick-take" procedure, and its precise holding was that the city had not justified use of that procedure. But the court also emphasized that the city likely would have failed to demonstrate public use "even had the case involved the use of regular condemnation," *id.* at 351, and that, separate and apart from the quick-take issue, the city's action did not "fully comport" with the approach approved by *Kelo*. *Id.* at 352.

[10] At least one federal court has employed the same approach to *Kelo*. *See MHC Fin. Ltd. P'ship* v. *City of San Rafael*, 2006 WL 3507937, at *14 (N.D. Cal. 2006) (denying city's motion for summary judgment on the grounds that, "[i]n *Kelo*, the City of New London offered a 'carefully considered development plan,'

3. This reading of *Kelo* makes good sense. If courts must eschew "empirical debates over the wisdom of takings," *Kelo*, 545 U.S. at 488, it follows that those debates are being entrusted to the political process. The only protection for landowners, then, is to ensure that the political process is actually being employed. Requiring that the eminent domain decision be reached through a comprehensive planning process—in which the government's *actual* reason for a taking is vetted—provides this assurance because "[o]ne would anticipate that any such process will attract competing views—not only between property owners and developers, but also among developers, contractors, and planners." Gillette, *supra*, at 18. "As a result, the capacity of a small rent-seeking group to impose its will on a complacent majority or an under-represented minority is diminished." *Id.*

Indeed, such an approach offers several checks on the government's otherwise untethered eminent domain power. First, it ensures that those whose land is to be taken will have their say at a time when that say might still matter. Second, it ensures that the community has openly and honestly weighed the impact of the taking on the landowner and deemed it necessary for the greater good. Third, it provides some assurance that—unlike in the instant case—the right hand of government is not taking steps of which the left hand is blissfully unaware. *See* Pet. 4-5 ("In deciding to acquire MiPro's property, Mount Laurel officials did not consult with the Planning Board"). This sort of procedural deliberation is critical if America's farmers are to have any recourse other than capitulation in the face of an arguably unreasonable or unnecessary assertion of eminent domain. As the examples in Part I, *supra*, illustrate, it is easy for the government to make an *ad hoc* decision, behind closed doors, to take Farmer Smith's land. That does not mean it would reach the same

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* * * [w]hereas here, the City proffers no such evidence, thereby inviting the court's inference that the ordinance simply confers a private benefit on the incumbent tenants.") (quoting *Kelo*, 545 U.S. at 478).

decision if forced to justify that decision under the bright lights of an open forum.

4. In upholding what can only be described as a "random taking," Pet. App. 3a, the Supreme Court of New Jersey cavalierly swept aside the basic procedural safeguards that this Court has recognized are inherent in the Takings Clause. If left to stand, the decision will embolden government entities to seize private property for "economic development" and other similarly vague purposes without subjecting their decisions to public scrutiny and debate. AFBF recognizes that the taking of private property—including farmland—is sometimes necessary and unavoidable. But if farmers are going to have any meaningful opportunity to convince government officials that the taking of their land is unreasonable or unwarranted, this Court must reaffirm that the Takings Clause requires eminent domain decisions to comport with basic standards of procedural fairness.

## CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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MOTION FILED

MAY 0 4 2007

No. 06-1345

IN THE

# SUPREME COURT OF THE UNITED STATES

MiPRO HOMES, L.L.C. and
BUILDERS LEAGUE OF SOUTH JERSEY, INC.,
*Petitioners,*

*v.*

MOUNT LAUREL TOWNSHIP,
*Respondent.*

ON PETITION FOR A WRIT OF CERTIORARI TO
THE SUPREME COURT OF NEW JERSEY

## MOTION FOR LEAVE TO FILE *AMICUS CURIAE* BRIEF AND BRIEF OF AVALONBAY COMMUNITIES, INC. AS *AMICUS CURIAE* IN SUPPORT OF THE PETITIONER

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## MOTION FOR LEAVE TO FILE *AMICUS CURIAE* BRIEF

Pursuant to Rule 37.2, AvalonBay Communities, Inc. of Alexandria, Virginia, ("AvalonBay"),[1] a publicly-owned real estate investment trust and one of the nation's largest developers, owners, and managers of rental apartment housing, respectfully moves for leave from this Court to file the attached brief as *amicus curiae* in support of the Petitioner's request for a writ of certiorari. None of the parties have consented to the filing of this or any other brief *amicus curiae.*

In Connecticut, AvalonBay frequently develops residential apartment communities by availing itself of Connecticut's "affordable housing" statute, Conn. Gen. State. §8-30g. This statute provides that when a municipal zoning commission denies a residential development in which the developer agrees to set aside thirty percent of its proposed units at rents that are within the economic means of low and moderate income families, and the developer appeals that denial to court, the burden of proof on appeal shifts to the commission to prove that each reason for denial is a "substantial public interest" implicating health or safety and "clearly outweighs" the regional need for affordable housing. The statute is, therefore, a mechanism for overriding exclusionary zoning ordinances, a state-mandated reduction of local authority to dictate land use, and in many cases, controversial and unpopular among local officials and residents.

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[1] Pursuant to Rule 37.6 of this Court, amicus states that its counsel authored this brief and amicus paid for it. The brief was not written in whole or part by counsel for a party, and no one other than amicus made monetary contribution to its preparation.

As a result, in Connecticut, in several instances, municipalities have turned to eminent domain in order to preempt or avoid development applications brought under §8-30g, in order to avoid both its burden-shifting mechanism and perceived adverse impacts of low and moderate income households. AvalonBay has been the condemnee in two such cases, in the Town of Orange: *AvalonBay Communities v. Town of Orange*, 775 A.2d 284 (Conn. 2001) and *AvalonBay Communities v. Town Plan and Zone Commission*, 796 A.2d 1164 (Conn. 2002); and in the Town of Darien: *Town of Darien v. Estate of D'Addario*, 784 A.2d 337 (Conn. 2001). The Darien case was settled, but in Orange, AvalonBay obtained a permanent injunction to prevent the town from using eminent domain to stop its proposed residential, affordable development.

AvalonBay continues to develop in Connecticut, including under §8-30g. It also develops in New Jersey. Particularly in light of this Court's affirmation of the eminent domain power in *Kelo v. New London*, 545 U.S. 469 (2005), municipalities sometimes turn to eminent domain to ward off what they view as undesirable residential development. As such, AvalonBay has a direct and substantial interest in the Question Presented in the Petition.

Through the attached brief *amicus curiae*, AvalonBay wishes to (1) bring to this Court's attention the fact that the Connecticut courts, interpreting the public use requirement of the Takings Clause of the Fifth Amendment and the parallel provision of the Connecticut Constitution, have held that eminent domain must be based upon a public planning process, and that a government's proffer of a pretextual reason for using eminent domain

constitutes bad faith that invalidates the government's action; (2) point out that Connecticut's interpretation of the Takes Clause is thus substantially different from that of the New Jersey courts in the case at issue in the instant Petition; (3) explain how New Jersey's interpretation of the Fifth Amendment undermines what protection from eminent domain abuse is left to condemnees after *Kelo*; and (4) urge this Court to grant the Petition in order to resolve the split between Connecticut and New Jersey and among the other cases noted in the Petition, and to clarify procedural requirements and limitations that attend the exercise of eminent domain.

Dated: May 4, 2007

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## ARGUMENT

**THE CONNECTICUT AND NEW JERSEY COURTS, AMONG OTHERS, ARE SPLIT AS TO WHETHER THE FIFTH AMENDMENT TAKINGS CLAUSE REQUIRES THAT EMINENT DOMAIN BE BASED ON A PLANNING PROCESS AND CARRIED OUT WITHOUT PRETEXT, AND THIS COURT SHOULD RESOLVE THE SPLIT.**

### A. In Connecticut, Eminent Domain Must Be Based on a Plan, and Government's Reason For Condemnation Must Not Be Pretextual.

The Connecticut Supreme Court has held that it considers the takings provision of the Connecticut Constitution, Article I, §11,[2] to provide the same rights and to be subject to the same limitations as the Takings Clause of the Fifth Amendent. *See, e.g., Santini v. Conn. Hazardous Waste Management Service,* 739 A.2d 680, at 688, n.20 (Conn. 1999), *cert. denied,* 530 U.S. 1225 (2000); *Cumberland Farms v. Town of Groton,* 808 A.2d 1107, 1124-31 (Conn. 2002). Moreover, Connecticut has recognized that this Court's interpretations of provisions of the Bill of Rights furnish a minimum standard for interpretation of parallel state constitutional provisions. *See, e.g., State v. Geisler,* 610 A.2d 1225, 1231-32 (Conn. 1992).

Interpreting the public use requirement of the federal and state takings clauses, the Connecticut courts have held that the use of eminent domain must be based on a good faith planning process, and must be carried

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[2] "The property of no person shall be taken for public use, without just compensation therefore." Connecticut Constitution, Article I, §11.

out without pretext. The two cases that best illustrate these holdings are *AvalonBay Communities v. Town of Orange*, 775 A.2d 284 (Conn. 2001) (noted in the Petition, at 20), and the state court decision in *Kelo v. New London*, 843 A.2d 500 (Conn. 2004), *aff'd*, 545 U.S. 469 (2005).

From 1997 through 2001, AvalonBay successfully challenged the Town of Orange's attempt to use eminent domain to block an affordable housing development.

In August 1997, AvalonBay filed an application with the Orange Town Plan and Zoning Commission for a permit to construct a 172 unit apartment home community on 9.6 acres of land. The town's zoning regulations permitted multi-family housing on the subject property.

AvalonBay's application, however, proposed that twenty-five percent[3] of the residential units be subjected to maximum rent restrictions that would keep the units within the economic reach of households earning less than eighty or sixty percent of the statewide median income. By doing so, AvalonBay brought its application under Connecticut's "affordable housing statute," Conn. Gen. Stat. §8-30g (2007). That statute, adopted in 1989 in response to a statewide affordable housing crisis,[4] provides that if a residential developer agrees to set aside a specified percentage of proposed units for low and moderate income families, a municipal zoning commission denies the permit application,

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[3]Since amended to thirty percent, *see* Connecticut Public Act 00-206.

[4]Connecticut Public Act 89-311, §2.

and the developer appeals to the Superior (trial) Court, the burden of proof shifts to the municipal agency to demonstrate to the court that each of its reasons for denial constitutes a "substantial public interest in health [or] safety" that "clearly outweighs" the need for affordable housing in the town and the region. Thus, in a §8-30g appeal, a municipal zoning commission's factual findings and conclusions are not accorded deference, as in traditional land use cases; commissions must prove to the court a compelling reason for denial. This statute thus provides applicants with a mechanism to alter or override zoning regulations that have the intent or effect of excluding low and moderate income families. *See generally, West Hartford Interfaith Coalition v. Town Council,* 636 A.2d 1342 (Conn. 1994) (one purpose of §8-30g is to facilitate amendments to restrictive zoning ordinances); *Quarry Knoll II Corp. v. PLanning and Zoning Commission,* 780 A.2d 1 (Conn. 2001) (explaining the burden-shifting mechanism and standards for burden of proof).

Orange is an affluent community whose housing stock is predominately single-family detached homes on large lots. The town is located west of New Haven along Interstate 95.

At the time of AvalonBay's application, Orange had a critical shortage of affordable housing: of approximately 4,700 residential units, only forty-five qualified as price-restricted or subsidized housing under the state's definition, and all of these units were age-restricted, and thus unavailable to families with children.

Despite this shortage of housing, and even though the subject property was located in a zone that permitted multi-family housing by special permit, local reaction

to AvalonBay's application was immediately hostile. The First Selectman led the charge, predicting at a public meeting that the proposed development would bring more than 100 new school-aged children to town, would require construction of a new $20 million school, and would result in higher taxes for existing residents and increased crime. An assistant police chief predicted that the development would generate criminal mischief, burglary, domestic violence, and other crimes.

In March 1998, while AvalonBay's land use permit application was pending before local agencies, the First Selectman announced the Town's intent to take the property by eminent domain. The First Selectman's clear intention was to use eminent domain to exclude low income families with school-age children who would reside in the AvalonBay development.

Several weeks later, the Board of Selectmen announced a proposal for a 172 acre "Orange Enterprise and Technology Park," that would encompass the AvalonBay nine acre property. At that time, the Town had never discussed any proposal for a technology park in this location, and had not conducted any study of need for or feasibility of a technology park in Orange.

In August of 1998, the Board of Selectmen hired a civil engineer to prepare a plan for the technology park. At the same meeting, the Board adopted a resolution appropriating $1.5 million to condemn the property.

In November 1998, voters defeated a referendum that would have authorized the $1.5 million for condemnation. In December, the Board adopted a second resolution to appropriate this amount again, for the same purpose. This time, the Selectmen better educated vot-

ers about the importance of stopping the AvalonBay development, making such comments as:

> When I think about this issue of the Avalon project, I hear a giant sucking sound. And it's the sound of our resources and tax dollars being sucked into paying for additional services which will be required for the 168 families in this apartment complex.

The First Selectman acknowledged that the goal of the condemnation was "to eliminate the Avalon proposal and replace it with an enterprise and technology park." The referendum appropriating $1.5 million passed on January 21, 1999. In March 1999, the Board of Selectmen gave final approval for the condemnation. AvalonBay brought an injunction to stop the taking.

Interpreting the takings clause of the state constitution, the Connecticut Supreme Court affirmed a trial court's entry of a permanent injunction, on the grounds of the lack of a *bona fide* planning process and plan for the use of eminent domain, and because the condemnation was pretextual – not for economic development as claimed, but to thwart an otherwise legitimate use of the subject property. 775 A.2d at 293-302.

With respect to the lack of a planning process or plan, the Connecticut court observed that the town had finalized its eminent domain resolution long before its technology park plan was completed, *id.* at 299; the plan itself was amply proven to be "hastily assembled, poorly envisioned, and incomplete," *id.* at 300; and while purporting to cover a 172 acre development, the plan was detailed with respect to only one parcel, the AvalonBay piece. *Id.* at 301. The court expressly noted

that *even though* the technology park plan on its face satisfied the essential statutory elements for municipally-sponsored economic development, *see* Conn. Gen. Stat. § §8-186 *et seq.* (municipal economic development – the same statutes at issue in *Kelo*), the *absence* of anything more than "the bare minimum amount of information and planning as to any future industrial park" rendered invalid the town's use of eminent domain to try to carry out that plan. *Id.* at 299. The court described the project plan as "a necessary component in effectuating a taking by eminent domain. . . ." *Id.* at 300.

The Connecticut court also invalidated the condemnation because the town's action was pretextual: its publicly-stated reason for using eminent domain was demonstrably false, and this alone was sufficient to invalidate the town's use of its sovereign power to condemn. The court credited the trial court's finding that the actual purpose of the condemnation was "to regain control of property that some statutes, such as the affordable housing statute, allegedly take away from municipalities." *Id.* at 299. Eminent domain was used "in bad faith and in furtherance of a plainly improper motive, namely, as a pretext to thwart what would otherwise be a legitimate use of property." *Id.* at 302. It is noteworthy that the Connecticut court did not focus on whether the town's *actual* motive was proper, but on whether its *stated* public purpose – facially valid or not – was pretextual.

With regard to the requirement of a *bona fide*, good faith plan and planning process, *Kelo* stands for the same principle. The Connecticut Supreme Court's opinion is replete with descriptions of and references to the City of New London's comprehensive planning process – public hearings, consideration of alternatives, numerous

plan revisions, supporting economic studies, etc. – as the foundation of a constitutionally sufficient exercise of eminent domain. 843 A.2d 508-11, 535-47.

In Connecticut, therefore, exercise of the sovereign power of eminent domain requires compliance with two procedures, as the Petitioners here have urged: a good faith plan, which by definition prevents an *ad hoc* use of eminent domain; and an accurately stated reason, not on that is pretextual, misleading, or dishonest.

### B. Thus, Connecticut and New Jersey Are Split As To These Procedural Requirements For Use of Eminent Domain.

The decision of the New Jersey Supreme Court in *MiPro Homes* is dismetrically opposed to Connecticut's interpretation of the procedural requirements for eminent domain under the federal Takings Clause, in two respects.

First, the New Jersey courts have held that a municipality, in order to use eminent domain, need not have a plan or planning process for *either* its use of eminent domain, *or* its use of the land after it has acquired title. *Ad hoc* decisions to condemn are therefore permissible, as are condemnations with no prior contemplation of the use of the condemned land other than "saving it" from some disfavored use. Mount Laurel Township simply did not need to have a plan to use the condemned land. Moreover, it did not matter to the New Jersey courts that the condemnation not only was not consistent with any plan, but was contradictory to the township's existing open space acquisition plan.

Second, the *MiPro Homes* decisions hold that whether the asserted reason for condemnation is accurate or hon-

est is irrelevant, so long as one underlying result is valid. In this case, although the township argued, and the New Jersey courts agreed, that preserving open space and preventing development are two sides of the same coin, the fact remains that the township *stated* that it was using eminent domain *specifically* to preserve open space, but it concluded that this purpose was *incidental* at best to the real reason, which was avoiding perceived impacts of residential development, claimed to be additional public school children, traffic, and pollution (as though these were self-evident impacts).

Had AvalonBay's case against the Town of Orange, Connecticut arises in New Jersey, the result would have been different: Orange condemned AvalonBay's land purportedly for economic development. As we know from *Kelo*, the Connecticut legislature and its citizens have a "strong and sustained interest" in municipal economic development and a detailed statutory framework [Conn. Gen. Stat. §§8-186 *et seq.*] that supports such purposes. Connecticut's interest in and statutory support of municipal development thus parallels the interest of New Jersey's legislature and citizens in open space, as described in the New Jersey Supreme Court's opinion, Petition Appendix at 1a. But the fact that Orange used eminent domain to take the AvalonBay parcel without a plan in place to effectuate economic development, and contrary to its own zoning regulations, would be of no moment in New Jersey, because *MiPro Homes* holds that a plan was unnecessary.

Similarly, the pretext argument that AvalonBay successfully advanced in Connecticut would be rejected in New Jersey. Under *MiPro Homes*, the fact that a township's stated reason for emiment domain is not the actual reason is of no consequences.

Thus, New Jersey courts have stated their willingness to countenance the exercise of eminent domain in ways that would be ruled unconstitutional in Connecticut.

### C. This Split Between Connecticut and New Jersey, and Among Other Courts, Implicates Directly Whether the Deference to Condemning Agencies That Was Reaffirmed in *Kelo* Has Any Limits, and Must Be Resolved.

The Petition, at 16-20, amply documents that this split between the Connecticut and New Jersey courts regarding whether the use of eminent domain rests on procedural requirements of a good-faith plan and the absence of pretext extends to at least four federal circuits and seven states. In this sense, the Petition has amply documented the breadth and gravity of the split: it is nationwide, and the courts are certainly "splintered" in their interpretation of these procedural requirements for eminent domain. The issue is well developed for this Court's review.

But what should motivate this Court to grant the instant Petition is the importance of the issue on which these courts are divided. AvalonBay respectfully submits that *the issue is no less than the procedural prerequisites — the underpinnings, the foundational requirements — to the substantial deference to legislative determination of public use, public purpose, and public benefit that this Court reaffirmed in Kelo.* In other words, this Court's *Kelo* opinion makes it clear that its affirmation of judicial deference to the conclusions of the City of New London and its economic development agency *were rooted in the city's and the agency's comprehensive planning process and crafting of a good faith plan both*

*prior to and during the decision to use eminent domain. See, e.g.*, 545 U.S. at 472-75, 483-84, 487-89. Justice Kennedy, concurring in *Kelo, id.* at 493, summarized the majority view:

> This taking occurred in the context of a comprehensive development plan meant to address a serious city-wide depression, and the projected economic benefits of the project cannot be characterized as *de minimus* . . . The city complied with elaborate procedural requirements that facilitate review of the record and inquiry into the city's purpose.

In so stating, Justice Kennedy, like the majority, drew upon the fact that other seminal eminent domain decisions of this Court, *Berman v. Parker*, 348 U.S. 26 (1954) and *Hawaii Housing Authority v. Midkiff*, 467 U.S. 229 (1984), were based also on detailed public planning processes and redevelopment plans.[5] 545 U.S. at 492-93.

If eminent domain may be utilized without a plan, and notwithstanding pretext, then, as Justice Kennedy

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[5] Even this Court's regulatory takings/inverse condemnation jurisprudence is founded on planning requirements. *Penn Central Transp. Co. v. City of New York*, 438 U.S. 104 (1978) sets forth a three-factor analysis for regulatory takings, including reasonable, investment-backed expectations, which are founded on the existence or not of a government's plan for land use; and the "character of the governmental action," which in part examines whether government regulation is consistent with or contrary to government land use policies. In *Tahoe-Sierra Preservation Council v. Tahoe Regional Planning Agency*, 535 U.S. 302 (2002), the temporary moratorium that this Court sanctioned was the result of a public planning process. And the so-called *Nollan/Dolan* test (*Nollan v. Cal. Coastal Comm'n*, 483 U.S. 825 (1987) and *Dolan v. City of Tigard*, 512 U.S. 374 (1994)) for exactions requires a demonstration of nexus and proportionality between a permit condition and a governmental plan.

warned, *id.* at 493, judicial review of the public use question – long-recognized as a judicial function – will be undermined. Put another way, because *Kelo* clearly holds that deference to New London's legislative body was appropriate because its use of eminent domain was founded on a comprehensive and public planning process, how can the state court result in *MiPro Homes* stand, when the procedural underpinnings present in *Kelo* were absent in the New Jersey process? And as Professor Gideon Kanner recently put it, "[Once] we say that the public nature of the taking trumps improper municipal motivations, there is no telling where that can take us." G. Kanner, "What Does It Take To Recognize Bad Faith?" Just Compensation, Dec. 2006 at 12.

One other aspect of the *MiPro Homes* decision warrants granting of the Petition. New Jersey Justice Rivera-Soto was correct in pointing out that traditional just compensation rules will compensate MiPro Homes only for the value of its land as subdivided, but not for its hundreds of thousands of dollars of good-faith investment in residential development in reliance on Mount Laurel Township's stated open space acquisition plan, which did *not* target the subject parcel. Short of altering what is compensable as just compensation in eminent domain cases, forcing municipalities to adopt and follow good-faith planning processes prior to using eminent domain mitigates if not prevents property owners from incurring substantial but non-compensable expenditures in reliance on existing governmental land use plans.

## CONCLUSION

For the foregoing reasons, the Petition for Writ of Certiorari should be granted.

Dated: May 4, 2007

Respectfully submitted,

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FILED
JUN 5 - 2007
OFFICE OF THE CLERK
SUPREME COURT, U.S.

No. 06-1345

In The

# Supreme Court of the United States

MIPRO HOMES, L.L.C., AND BUILDERS LEAGUE OF SOUTH JERSEY, INC.,

*Petitioners,*

*v.*

MOUNT LAUREL TOWNSHIP,

*Respondent.*

**On Petition For a Writ Of Certiorari To The Supreme Court Of New Jersey**

## BRIEF OF AMICUS CURIAE NATIONAL ASSOCIATION OF HOME BUILDERS IN SUPPORT OF PETITIONERS

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With the written consent of the parties filed with the Clerk of the Court, the National Association of Home Builders (NAHB) respectfully submits this brief as *amicus curiae*.[1]

## INTEREST OF *AMICUS CURIAE*

NAHB represents more than 235,000 builder and associate members throughout the United States. Its members include people and firms that construct and supply single family homes, as well as apartment, condominium, commercial, and industrial structures, land developers, and remodelers. It is the voice of the American shelter industry. It is — and historically has been — vitally concerned with judicial decisions dealing with government taking and regulation of property, with a particular interest in this Court's interpretation and application of the 5th Amendment.

NAHB and its members regularly grapple with the complexities of competing demands for the use of land and the impact of comprehensive planning and eminent domain. NAHB is vitally concerned with the proper use of both and the prevention of their abuse.

NAHB has appeared before the Court as an *amicus curiae* or "of counsel" to property owners (and, most recently, in its own name) in a wide variety of 5th Amendment and real property cases. This participation

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[1] Counsel for *amicus curiae* authored this brief in whole and no other person or entity other than *amicus*, its members or counsel have made a monetary contribution to the preparation or submission of this brief.

began more than a quarter-century ago with *Agins v. City of Tiburon*, 447 U.S. 255 (1980), and continued with *San Diego Gas & Elec. Co. v. City of San Diego*, 450 U.S. 621 (1981); *Williamson County Reg. Planning Comm'n v. Hamilton Bank*, 473 U.S. 172 (1985); *MacDonald, Sommer & Frates v. Yolo County*, 477 U.S. 340 (1986); *First English Evangelical Lutheran Church v. County of Los Angeles*, 482 U.S. 304 (1987); *Nollan v. California Coastal Commn.*, 483 U.S. 825 (1987); *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992); *Dolan v. City of Tigard*, 512 U.S. 374 (1994); *Babbitt v. Sweet Home Chapter of Communities for a Great Or.*, 515 U.S. 687 (1995); *Suitum v. Tahoe Reg. Planning Agency*, 520 U.S. 725 (1997); *City of Monterey v. Del Monte Dunes*, 526 U.S. 687 (1999); *Palazzolo v. Rhode Island*, 533 U.S. 606 (2001); *Solid Waste Agency of N. Cook County v. U.S. Army Corps of Engineers*, 531 U.S. 159 (2001); *Tahoe-Sierra Preservation Council v. Tahoe Reg. Planning Agency*, 535 U.S. 302 (2002); *Borden Ranch P'Ship v. U.S. Army Corps of Engineers*, 537 U.S. 99 (2002); *City of Cuyahoga Falls v. Buckeye Cmty. Hope Found.*, 538 U.S. 188 (2003); *S. Fla. Water Mgmt. Dist. v. Miccosukee Tribe of Indians*, 541 U.S. 95 (2004), *Kelo v. City of New London*, 545 U.S. 469 (2005), *Lingle v. Chevron USA, Ltd.*, 544 U.S. 528 (2005), *San Remo Hotel v. San Francisco*, 545 U.S. 323 (2005), and *National Assn. of Home Builders v. Defenders of Wildlife*, No. 06-340 (pending decision).

NAHB thus offers its experience in this field and its national perspective in support of the Petitioners.

## SUMMARY OF ARGUMENT

This Court's decision in *Kelo v. City of New London*, 545 U.S. 469 (2005) provided only half an answer to the question of what are the boundaries of the concept of public use in eminent domain. It demonstrated the breadth of interests encompassed within that term. But both the majority opinion (545 U.S. at 487) and Justice Kennedy's concurring opinion (545 U.S. at 493) made clear that the Court understood the potential for governmental abuse and assured that the judiciary would be capable of dealing with abuse of the power of eminent domain when it arose.

If the Court had been actively searching for a case to provide the other half of the answer — to provide the bookend that shows where government may *not* go — this would be the ideal case. This is a case in which the condemning agency plainly went too far. It acted without the careful planning this Court saw in *Kelo* and, as New Jersey's appellate courts conceded, condemned MiPro's property without a plan at all. To date, however, the judiciary is not fulfilling this Court's promise in *Kelo* to guard against such abuse. The New Jersey Supreme Court upheld a taking that has only the flimsiest pretense of a public use. If that is legally acceptable, then there is no restriction at all and no 5th Amendment protection for property owners.

It is important for the Court to take this opportunity while *Kelo* is still an event of recent memory to demonstrate that there *is* a public use restriction on the power of eminent domain, and to

reassure the public that possession of power is no excuse for misusing it.

## I

## EMINENT DOMAIN MUST BE BASED ON SOUND PLANNING; OTHERWISE IT HAS NO LEGITIMATE BASIS.

When it decided *Kelo*, this Court made clear that its decision was based on what it viewed as comprehensive, well studied planning by the municipality. It was only in the context of such planning that the Court upheld the city's action:

> "The City has *carefully formulated* an *economic development plan* that it believes will provide appreciable benefits to the community . . . . As with other exercises with urban planning and development, the city is endeavoring to coordinate a variety of commercial, residential, and recreational uses of land, with the hope that they will form a whole greater than the sum of its parts. . . . Given *the comprehensive character of the plan, the thorough deliberation that preceded its adoption*, and the limited scope of our review, it is appropriate for us . . . to resolve the challenges . . . *in light of the entire plan*." (*Kelo*, 545 U.S. at 483-484; emphasis added.)

That, indeed, had been the position urged on the Court by the American Planning Association (APA), the

organized voice of the nation's land use planning professionals. That association urged the Court to uphold New London's actions because of the protections afforded to individuals by a comprehensive planning process. As the APA brief put it, "eminent domain is exercised only in conjunction with a process of land use planning that includes broad public participation and a careful consideration of alternatives to eminent domain." (*Kelo*, Amicus Curiae Brief of APA, et al., p. 25.)

The primary cases forming the basis for *Kelo* also firmly rooted their holdings in comprehensive planning, either for urban renewal in a large, run-down area of Washington, D.C. (*Berman v. Parker*, 348 U.S. 26 [1954]) or to rectify the semi-feudal land tenure arrangements prevailing in Hawaii (*Hawaii Housing Auth. v. Midkiff*, 467 U.S. 229 [1984]).

In recent years, the Court has embraced the view (consistently urged by APA and unchallenged by other litigants) that good land use planning is a good idea that should be encouraged. (See, e.g., *Tahoe-Sierra Preservation Council v. Tahoe Reg. Plan. Agency*, 535 U.S. 302, 339 [2002] ["interest in facilitating informed decisionmaking by regulatory agencies"]; *Palazzolo v. Rhode Island*, 533 U.S. 606, 620-621 [2001]; *Suitum v. Tahoe Reg. Plan. Agency*, 520 U.S. 725, 736 [1997].)

But it is more than that. In the eminent domain context, good comprehensive planning provides property owners with the protection of knowing that their land

will not be taken on a municipal whim,[2] that any resolution authorizing the forced conversion of private property into public property will be preceded by careful study, public hearings, and a fair opportunity for all community voices to be heard – including the voices of the affected property owners.[3] That is the consensus view of those commentators who have defended *Kelo*[4] in the teeth of sharp criticism and concern expressed by people who fear, as Justice O'Connor put it, that local government can now "replac[e] any Motel 6 with a Ritz-Carlton, any home with a shopping mall, or any farm with a factory." (*Kelo*, 545 U.S. at 503 [O'Connor, J., dissenting].)

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[2] "Nor would the City be allowed to take property under the mere pretext of a public purpose . . . ." (*Kelo*, 545 U.S. at 478.)

[3] "The takings before us . . . would be executed pursuant to a 'carefully considered' development plan" (*Kelo*, 545 U.S. at 478) in which "[t]he city complied with elaborate procedural requirements." (*Id.* at 493 [Kennedy, J. concurring].)

[4] See, e.g., Mark Pellegrini & Donald Poland, *Connecticut Planners Weigh In: Eminent Domain Is Important Land Use Tool*, 57 Planning & Environmental Law 8, 9 (APA, Sept. 2005) (use of eminent domain "should only occur after there is a rigorous, open, and fair public planning process"); Brian W. Blaesser, *Eminent Domain for Private Gain? The* Kelo v. City of New London *Decision and Aftermath*, 57 Planning & Environmental Law 3,5 (APA, Sept. 2005) (emphasizing that "the record below evidenced the comprehensive character of the economic development plan").

Plainly, this Court recognized that abuses of the eminent domain power could occur, but viewed them as "aberrations" with which the courts could deal – indeed, noting that courts in the past had scrutinized such abuses with "a skeptical eye." (*Kelo*, 545 U.S. at 487, n. 17.) Such problems, said the Court, "can be confronted if and when they arise." (*Id.* at 487.) Or, as Justice Kennedy put it, although *Kelo* was not in the suspect group, "there may be categories of cases in which the transfers are so suspicious, or the procedures employed so prone to abuse, or the purported benefits are so trivial or implausible" that the courts ought to deal with them. (*Id.* at 493 [concurring opinion].)

The problem is that *Kelo* provided lower courts with no guidance as to the location of the nether end of the public use spectrum, i.e., the point at which broad deference to local decisions ends and the "skeptical eye" comes into play. This case is the proverbial poster child for the out of bounds marker. This Township engaged in no planning. This Township had no specific use in mind when it condemned the MiPro property. In stark conflict with its own planning and zoning regulations, this Township acted solely to stop a residential development that had been properly approved through the Township's own process. And it did so while giving a wink and a nod to the judiciary, noting that it possessed the power to condemn for "open space" even though it had no plans or studies identifying this property as necessary or even useful as open park land while its avowed intent was merely to stop MiPro's approved residential development.

The trial court saw through the pretext, "confronted" it as this Court advised in *Kelo*, and struck it down. And yet two layers of New Jersey appellate courts thereafter held that this abject failure of planning was sufficient to fit within the *Kelo* matrix, validating the worst nightmares of those who saw *Kelo* as allowing cities to do virtually anything they choose.

This Court needs to take a stand. Now. Firmly. It needs to show the lower courts that it did not intend *Kelo* to loose a deluge of condemnations that have no basis in fact.[5]

## II

## MOUNT LAUREL ENGAGED IN NO PLANNING BEFORE INITIATING EMINENT DOMAIN; THE PROCESS WAS A SHAM BUT THE NEW JERSEY SUPREME COURT UPHELD IT.

What happened in Mount Laurel was not planning; it was its antithesis. Indeed, it is the paradigmatic illustration of the absence of planning. To the extent that this Township engaged in planning, the planning supported MiPro's residential development, not condemnation for some nondescript "open space." The property was planned and zoned for residential

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[5] The outpouring of eminent domain actions immediately after *Kelo* by agencies that felt unleashed by that decision is catalogued in Dana Berliner, *Opening the Floodgates: Eminent Domain Abuse In the Post-Kelo World* (2006).

development; the Township's Planning Board twice gave the project its approval, which was neither appealed nor litigated; there were no studies showing any different need.[6] All that happened — after MiPro's construction was under way — was that the Township made an *ad hoc* decision that it wanted to keep this development out of town, so it hastily condemned.[7] That was a Pavlovian reaction, not a well designed municipal plan.

Even the New Jersey appellate courts that approved this condemnation had to concede that there was no plan — but then (contrary to *Kelo*) asserted that the absence of a plan didn't matter. (Pet. App., pp. 16a,

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[6] The fact that a parcel of land is currently vacant does not mean that it is either needed or appropriate for some municipally owned "open space." It only means that the land is currently not being used. Municipal takeovers do not always yield positive results. See Timothy Williams, "Land Bought For Parks Often Winds Up Luring Trash and Old Cars," New York Times, Aug. 12, 2006, p. C16.

[7] This was not the first time that Mount Laurel chose to put itself in the land use spotlight for exclusionary activities. In *Southern Burlington County NAACP v. Township of Mount Laurel*, 336 A.2d 713 (N.J. 1975), the New Jersey Supreme Court forcefully told the Township that it was seeking to foist too much of the regional housing need onto its neighbors and needed to shoulder its fair share. It obviously hasn't learned and is trying another exclusionary ploy in the guise of condemning residential development land for open space in a way that stretches *Kelo* beyond recognition. This time, instead of merely saying it didn't want low and moderate income families, it said it didn't want *any* families.

23a.) Nor did the evident fact that the "public use" of preserving open space was no more than a pretext for stopping this specific residential development — even though MiPro's development was wholly consistent with the local planning and zoning and had been approved by the local Planning Board and not challenged.[8] NAHP understands that private property may be condemned for open space. The point here is that open space condemnation — like condemnation for any other use — must be preceded by careful municipal study of the kind discussed in *Kelo* in order to support it. Such a study was concededly absent here, rendering this particular open space condemnation invalid, and its approval by the New Jersey Supreme Court in conflict with the underlying basis of *Kelo* and the holdings by other courts discussed in the Petition and hereafter.

The actions of New Jersey's Appellate Division and Supreme Court demonstrate that they got only half of *Kelo*'s message. They got the part about "deference," but missed the part about the need for honest municipal planning providing the basis for the taking, and the part about restraint on condemnations whose basis is wholly pretextual. In the process, those courts seem to have overlooked their role in the litigation process. This case went to trial, and the trial court made extensive and

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[8] More than that, by waiting until after MiPro had begun construction, the Township caught MiPro at its most vulnerable moment. Adding insult, the New Jersey Supreme Court noted that MiPro should be compensated only for the face value of the land (Pet. App., p. 2a) even though that would fall short even of providing restitution, as the dissent aptly showed (Pet. App., pp. 5a-7a).

explicit findings of fact. Those findings plainly showed the sham nature of the Township's actions. The appellate courts did not set aside any of those findings, they simply ignored them. This Court has repeatedly warned against such actions, noting the important role played by triers of fact. (E.g., *C.I.R. v. Duberstein*, 363 U.S. 278, 289-291 [1960]; *England v. Louisiana Medical Examiners*, 375 U.S. 411, 416-417 [1964]; *Nectow v. Cambridge*, 277 U.S. 183 [1928].)

Without this Court's prompt intervention, the danger is real that the approach of the influential New Jersey Supreme Court will be adopted by others and remove the 5th Amendment's intended protection. This Court should act now to explain the lower limit of *Kelo* before more people are injured by decisions like this one. The country needs reassurance that, even under *Kelo*'s highly deferential standard of review, the core of the "public use" limitation remains in place and provides protection at *some* point.

## III

## WHEN EMINENT DOMAIN IS SHOWN TO BE BASED ONLY ON PRETEXT, AND NOT ON ANY REAL PLANNING PROCESS, THE JUDICIARY MUST – AS THIS COURT PLAINLY CONCLUDED IN *KELO* – STEP IN AND PROTECT THE PRIVATE PROPERTY OWNERS FROM SHAM PROCEEDINGS.

Reviewing the constitutionality of legislative acts is neither to be sought nor taken lightly. However, such

review is a necessary part of our constitutional system. As this Court explained, such review is undertaken:

> ". . . with all respect for the powers of Congress, but with recognition of the transcendent status of our Constitution." (*Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 159 [1963].)[9]

Whether legislative action complies with the Constitution is a question for the judiciary — and has been since *Marbury v. Madison*, 1 Cr. 137 (1803). Thus, even though *Kelo* insisted on deferring to municipal planning judgment, it based that conclusion on the premise that municipal judgment would be based on competent, comprehensive planning, and declared that judicial deference would not go so far as to rubber stamp obviously sham and pretextual actions. (*Kelo*, 545 U.S. at 487; see also *Id.* at 493 [Kennedy, J., concurring].)

In direct conflict with *MiPro*, this proper reading of *Kelo* was made by the Supreme Courts of Rhode Island (*Rhode Island Economic Dev. Corp. v. The Parking Company, L.P.*, 892 A.2d 87, 104 [R.I. 2006] ["*Kelo* . . . stressed the condemning authority's responsibility of good faith and due diligence before it may start its condemnation engine"], Ohio (*City of Norwood v. Horney*, 853 N.E.2d 1115, 1137 [Ohio 2006] ["deferential review is not satisfied by superficial scrutiny"; "our precedent does not demand rote deference to legislative findings in eminent domain"]

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[9] Plainly, municipalities are entitled to no more deference than Congress.

and Oklahoma (*Board of County Comm'rs v. Lowery*, 136 P.3d 639 [Okla. 2006] [relying on state constitution], and the Maryland Court of Appeals (*Mayor & City Council of Baltimore v. Valsamaki*, 916 A.2d 324, 348 [Md. 2007] ["it is not enough . . . to simply say that it is conducting urban renewal and leave it at that"]).

The necessary restraint placed on total deference to municipal action arises directly from the Constitution, and specifically from the Bill of Rights, which was designed to restrict the power of government. This is, after all, the 5th Amendment to the U.S. Constitution that is being applied, and the bedrock protection declared in *Kelo* cannot be undermined by state courts acting like New Jersey's appellate courts.

As Justice Holmes explained for the Court early in the 20th century, "[t]he greatest weight is given to the judgment of the legislature, *but it always is open* to interested parties to contend that the legislature has gone beyond its constitutional power." (*Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 413 [1922].)[10]

That philosophy of judicial restraint was stressed again more recently in *City of Monterey v. Del Monte Dunes*, 526 U.S. 687 (1999), when the Court concluded:

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[10] See also *Winger v. Aires*, 89 A.2d 521, 522 (Pa. 1952) (enjoining improper use of eminent domain): "The genius of our democracy springs from the bedrock foundation on which rests the proposition that office is held by no one whose orders, commands or directives are not subject to review."

> "To the extent the city argues that, as a matter of law, its land-use decisions are immune from judicial scrutiny *under all circumstances*, its position is contrary to settled regulatory takings principles. We reject this claim of error." (*Del Monte*, 526 U.S. at 707; emphasis added.)

*Del Monte* was a continuation of the Court's modern regulatory taking decisions and a precursor of *Kelo*. Its rejection of deference to municipal action "under all circumstances," the standard the government had sought, forms an appropriate jurisprudential bridge.

In *First English*, the Court ended years of indecision by concluding that compensation is the proper remedy for a regulatory taking. Despite that holding's clear 5th Amendment grounding, the defendant county and its many *amici* had argued that the constitutional mandate be subordinated to their fiscal and operational concerns. The Court rejected that hyperbolic plea, concluding that:

> "We realize that even our present holding will undoubtedly lessen to some extent the freedom and flexibility of land-use planners and governing bodies of municipal corporations when enacting land-use regulations. But such consequences necessarily flow from any decision upholding a claim of constitutional right; *many of the provisions of the Constitution are designed to limit the flexibility and freedom of governmental authorities*, and

> the Just Compensation Clause of the Fifth Amendment is one of them." (*First English*, 482 U.S. at 321; emphasis added.)

*First English* and the cases leading up to it saw this Court granting substantial deference to the governing activities of municipalities noting expressly, for example, that "normal" delay in the planning process would not lead to governmental liability. (*First English*, 482 U.S. at 321; see also *Tahoe-Sierra*, 535 U.S. at 333.) But *First English* expressed the need for a constitutional limit at some point even if that restricted government's freedom and flexibility.

*Kelo* began the trip down that same road for direct condemnation.[11] It held that government was entitled to substantial leeway in order to perform its legitimate functions and, as long as it acted in a conscientious planning mode, all would be well. But there are limits. *Kelo*'s majority obviously believed that government deviance would be limited to the occasional exception, and assumed that the judiciary would handle such situations as it had in the past. (*Kelo*, 545 U.S. at 487.) However, as this case illustrates, lower courts need more explicit guidance. They need this Court to show by example how far (to borrow the words of Justice Holmes) is "too far" (*Pennsylvania Coal*, 260 U.S. at 415) in the direct condemnation context.

*Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992) is instructive. Viewing a statute that

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[11] Direct and inverse condemnation are based on the same substantive law. (See *First English*, 482 U.S. at 315.)

contained numerous "legislative findings" to support its conclusion (see 505 U.S. at 1021, n. 10), this Court stressed that what is important is *not* the voiced legislative rationale, but whether the underlying facts actually support the legislative result. Remanding the case to give the State an opportunity to defend its legislative handiwork, this Court "emphasized[d] that to win its case, South Carolina must do more than proffer the legislature's declaration . . . or its conclusory assertion . . . ." (*Lucas*, 505 U.S. at 1031.) *A fortiori*, if the legislature's actual (albeit conclusory) formulation of a supposed justification is insufficient to validate legislation challenged under the Takings Clause — unless supported by facts produced at trial — then pretextual condemnation for open space that is not even a thinly disguised cloak for an effort to abort a legitimate and approved home building project cannot suffice either.

## CONCLUSION

In *Kelo*, this Court collected some illustrations of the kind of abuses that can occur in the eminent domain process, largely abuses brought about when local entities yielded to influence from those with inside connections or the ability to apply sufficient pressure. (E.g., *99 Cents Only Stores v. Lancaster Redev. Agency*, 237 F. Supp. 2d 1123 [C.D. Cal. 2001] [condemnation influenced by Costco, described by the city as its "800 pound gorilla"].) Although the Court viewed such events as "aberrations" (*Kelo*, 545 U.S. at 487, n. 17), the awful example at bench is here less than two years later. What this case shows is that, unless checked by this Court, municipalities will be emboldened by

decisions like the New Jersey Supreme Court's and the "aberrations" will multiply. This example cannot be allowed to remain on the books as an approved condemnation under the *Kelo* standard.

NAHB urges that Certiorari be granted.

Respectfully submitted,


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